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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912. 1913

No. 45

LUCIANO CHAVEZ, APOLONIO CHAVEZ, GREGORIO CHAVEZ, ET AL., APPELLANTS,

vs.

ELOISA LUNA DE BERGERE, ALFRED M. BERGERE, ADELINA OTERO, ET AL.

PPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED MAY 2, 1910.

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SUPREME COURT OF THE UNITED STATES

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No. 43.

LUCIANO CHAVEZ, APOLONIO CHAVEZ, GREGORIO CHAVEZ, ET AL., APPELLANTS,

vs.

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In the Supreme Court of the Territory of New Mexico, January Term, 1909.

No. 1180.

ELOISA L. DE BERGERE et al., Appellees,
v.
LUCIANO CHAVES et al., Appellants.

The United States of America to Eloisa Luna de Bergere, Alfred M. Bergere, Adelina Otero, Edward Otero and Manuel B. Otero, Greeting:

You and each of you are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, D. C., sixty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the Supreme Court of New Mexico, prayed and allowed, wherein Luciano Chavez, Apolonio Chavez, Gregorio Chavez, Ascension Chavez, Antonio Sandoval, Altagracia Chavez and Rosario Rodriquez de Chavez were appellants and you are appellees, to show cause, if any there be why the judgment rendered against the appellants in said cause, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the Supreme Court of the Territory of New Mexico this 2nd day of March, 1910.

WILLIAM H. POPE,
Chief Justice of the Supreme Court of New Mexico.

[Seal Supreme Court, Territory of New Mexico.]

Teste:

JOSÉ D. SENA,
Clerk of the Supreme Court of New Mexico.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

A. B. Renehan being first duly sworn upon his oath according to law says that he is the attorney of the defendants, Luciano Chaves et al. in the case against them lately pending on appeal in the Supreme Court of the Territory of New Mexico, wherein Eloisa Luna de Bergere et al. were plaintiffs in the District Court of the First Judicial District of the Territory of New Mexico sitting for the County of Santa Fe, and in which the said plaintiffs were appellees in the said Supreme Court of the Territory of New Mexico; that on the ——— day of March, 1910, affiant served upon Messrs. Catron & Catron, attorneys for the plaintiffs and appellees, at the City and County of Santa Fe, in said Territory, a true and correct duplicate original of the citation hereto annexed on appeal of the said cause

to the Supreme Court of the United States, by then and there personally delivering the same to them, at their offices in said City of Santa Fe.

Affiant further says that Catron & Catron, a law firm composed of Thomas B. Catron and Charles C. Catron, are successors in the practice of the law to Catron & Gortner, a law firm at first composed of Thomas B. Catron and Robert C. Gortner, and afterwards composed of Charles C. Catron and Robert C. Gortner, which said firms were successively attorneys for the said plaintiffs and appellees in said cause.

Further affiant saith not.

A. B. RENEHAN

Subscribed and sworn to before me this 26th day of April, 1910.

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

[Seal Supreme Court, Territory of New Mexico.]

In the Supreme Court of the United States of America, October Term, A. D. 1910.

No. —.

LUCIANO CHAVES et al., Appellants,
vs.
ELOISA LUNA DE BERGERE et al., Appellees.

Appeal from Supreme Court, Territory of New Mexico.

Transcript of Record.

Be it remembered, That heretofore, on to-wit, on the 28th day of November, A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a cause therein entitled Eloisa L. de Bergere, et al., appellees, vs. Luciano Chaves, et al., appellants, and numbered on the docket thereof No. 1180, which portions of the said transcript of record, are in words and figures following to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1907.

ELOISA L. DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES et al., Appellants.

Appeal from District Court, Santa Fe County.

Transcript of Record.

In the District Court of the First Judicial District of the Territory of New Mexico, in and for the County of Santa Fe.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

Pleas before Honorable Edward A. Mann, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Sixth Judicial District thereof, in place and lieu of Honorable John R. McFie, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the First Judicial District Court thereof, within and for the County of Santa Fe, in said district.

Be it remembered, That heretofore, to wit, on the third day of April, A. D., 1901, there was filed in the office of the Clerk of said First Judicial District Court, a complaint, which said complaint is in words and figures as follows, to wit:

In the District Court in and for the County of Santa Fe, in the First Judicial District of the Territory of New Mexico:

No. 4265.

ELOISA LUNA DE BERGERE, ALFRED M. BERGERE, Her Husband, and Adelina, Edward and Manuel B. Otero, Minor Children of Manuel B. Otero, Deceased, by Alfred M. Bergere, Guardian of Their Persons and Estates, all Being Residents of the County of Santa Fe, in the Territory of New Mexico, Plaintiffs,

vs.

LUCIANO CHAVEZ, APOLONIO CHAVEZ, GREGORIO CHAVEZ, ASCENsion Chavez, Antonio Sandoval, Altagracia Chavez, Rosaria Rodriguez de Chavez (Being the Heirs at Law of Jose de la Cruz Chavez, Deceased), Residents of said County of Santa Fe, in the Territory of New Mexico, Defendants.

Complaint.

Plaintiffs aforesaid complain of defendants, and for their cause of action herein state:

1. That heretofore, to wit, on the first day of January,
4 A. D., 1901, plaintiffs were legally entitled to the possession of that certain tract, piece and parcel of land and real estate situate, lying and being in the County of Santa Fe aforesaid, and known as and commonly called "The Galisteo Grant," the extent, location and boundaries of said grant being as follows:

Beginning at the northeast corner of the survey thereof by Albert F. Easley, made under the direction of the Surveyor General of the United States for the Territory of New Mexico, and remaining on file in the office of said Surveyor General; thence north seventy-seven degrees fifteen minutes west to the east side of the old reservoir site of the people of Galisteo; thence, first in a southerly direction and afterwards in a northwesterly direction following the meanders of the edge of said reservoir site, in such manner as to exclude the same, to the northeast corner of an old stone wall, constituting the east and north boundary of the allotment made in said grant to one Matias Sondoval; thence, following said stone wall in a southerly and westerly direction until the same intersects the east boundary of the homestead entry No. 3460, patented to Rafael Ortiz on January 11th, 1897; thence south along said east boundary to the north bank of the Galisteo river; thence, in an easterly direction, following the meanders of said river, to its junction with the arroya Atascoso, or Rio del San Cristobal; thence, crossing the Galisteo river in an easterly direction to the north bank of said Arroyo Atascoso; thence, following said north bank in an easterly direction to the east boundary of said survey by said Easley; thence in a right line to the point of beginning; being the same premises indicated by letters A, B, C, D, E, F, G, H, I, J, K, L and M
5 on plat attached as Exhibit "A" to objections filed by the United States to the survey of said Easley, in cause No. 54 in the Court of Private Land Claims of the United States, in and for the Territory of New Mexico, in a certain cause therein entitled Luciano Chavez et al. vs. The United States of America.

2. That defendants thereafter, on, to wit, the day and year aforesaid, January 1st, 1901, entered into such premises and unlawfully withheld the same from the plaintiffs, and unlawfully withheld the same and the possession thereof from the plaintiffs.

3. Wherefore plaintiffs have been damaged in the sum of ten thousand dollars; and plaintiffs therefore bring suit, and pray judgment of this honorable court, for the possession of the said premises together with their damages as aforesaid and costs.

CATRON & GORTNER,
Attorneys for Plaintiffs.

Santa Fe, N. M.

Which said complaint is endorsed in words and figures as follows, to wit:

No. 1265. District Court, Santa Fe County. Eloisa L. de Bergere et al. vs. Luciano Chavez et al. Complaint. Filed in my office April 3rd, 1901. A. M. Bergere, Clerk. Catron & Gortner, Santa Fe, N. M.

And thereafter and on, to wit, the 3rd day of May, A. D., 1901, there was filed in the office of the Clerk of the District Court
6 in and for the County of Santa Fe the plea in said cause, which said plea is in words and figures as follows, to wit:

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting in and for the County of Santa Fe.

ELOISA LUNA DE BERGERE et al.
vs.
LUCIANO CAVEZ et al.

And the said Luciano Chavez, Apolonio Chavez, Gregorio Chavez, Ascension Chavez, Antonio Sandoval, Altagracia Chavez, and Rosario Rodriguez de Chavez, the said defendants, and each of them, by A. B. Renehan, their attorney, come and defend the force and injury when, etc., and say that they, and neither of them, are guilty of said supposed trespasses and ejectment and are withholding the possession of the premises described in the petition herein, as therein laid to their charge, or the charge of either of them, or any part thereof, in manner and form as the said plaintiffs have above thereof complained against them, and of this, the said Luciano Chavez, Apolonio Chavez, Gregorio Chavez, Ascension Chavez, Antonio Sandoval, Altagracia Chavez, and Rosario Rodriguez de Chavez, put themselves upon the country etc.

And for a further plea in this behalf the said defendants say that the plaintiffs ought not to have or maintain their aforesaid action against them, the said defendants, or either of them, because they say that the supposed causes of action in the said petition mentioned or either of them, did not accrue to the plaintiffs at any time within ten years next before the commencement of this suit, in manner
7 and form as the plaintiffs have above complained against them, the said defendants, and this, the said defendants are ready to verify; wherefore they pray judgment if the plaintiffs ought to have or maintain its aforesaid action against them or either of them, etc.

A. B. RENEHAN,
Attorneys for Defendants.

P. O. Address, Santa Fe, N. M.

Which said plea is endorsed in words and figures as follows, to it:

No. 1265. District Court, Santa Fe County. Eloisa Luna de Bergere et al. vs. Luciano Chavez et al. Plea. Filed in my office May 3rd, 1901. A. M. Bergere, Clerk. A. B. Renehan, Attorney for Defendants.

And thereafter and on, to wit, the 10th day of May, A. D., 1901, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico in and for

the County of Santa Fe a replication, which said replication is in words and figures as follows, to wit:

District Court, Santa Fe County.

ELOISA LUNA DE BERGERE et al.
vs.
LUCIANO CAVEZ et al.

Ejectment.

Replication and Similiter.

Come plaintiffs by their attorneys herein and as to the first plea of the said defendants, as to which they have put themselves upon the country, plaintiffs do the like.

And as to the second plea of the said defendants, plaintiffs say they ought not by anything therein pretended or alleged to be precluded from having or maintaining their aforesaid action against said defendants or either of them, and say that said causes of action in the complaint herein mentioned did accrue to the plaintiffs within ten years next before the commencement of this suit, in manner and form as plaintiffs have complained of said defendants; all of which plaintiffs are ready to verify; wherefore they pray judgment as in and by their complaint.

And as to any and all new matter in said plea or reply of defendants contained, plaintiffs deny the same generally and specifically.

Wherefore plaintiffs pray as in and by their complaint, etc.

CATRON & GORTNER,
Attorneys for Plaintiffs.

May 10th, 1901.

Which said replication is endorsed in words and figures as follows, to wit:

No. 4265. District Court, Santa Fe County. Eloisa L. de Bergere et al. vs. Luciano Chavez et al. Replication, etc. Filed in my office May 10th, 1901. A. M. Bergere, Clerk. Catron & Gortner for plaintiffs.

And thereafter and on, to wit, the 18th day of September, A. D. 1901, there was entered of record in said court the waiving of a jury in said cause, which said entry is in words and figures as follows, to wit:

No. 4265.

ELOISA L. DE BERGERE et al.
vs.
LUCIANO CHAVEZ et al.

This cause coming on to be heard on the regular call of the docket, on agreement of the parties, plaintiffs and defendants, a jury is hereby waived and by stipulation will be heard by the Court in Chambers.

Which said order is entered of record in Civil Record I, page 53, of the County of Santa Fe, First Judicial District of the Territory of New Mexico.

And thereafter and on, to wit, the 27th day of January, A. D., 1904, there was filed in the office of the Clerk of said court an amended replication, which said amended replication is in words and figures as follows, to wit:

In the District Court in and for the County of Santa Fe, Territory of New Mexico.

ELOISA L. DE BERGERE et al.
vs.
LUCIANO CHAVEZ et al.

Motion.

Now comes the plaintiffs and move the court for leave to file amended reply or replication herewith presented, in order to conform the pleadings and proofs already taken in the cause and in the furtherance of justice, as shown by the status of said cause.

CATRON & GORTNER,
Attorneys for Plaintiffs.

January 23rd, 1904, Santa Fe, N. M.

To A. B. Renehan, Attorney for Defendants.

DEAR SIR: Please take notice of the foregoing motion and the reply therein referred to; both of which have been transmitted to the honor. John R. McFie, before whom said cause is now pending for submission on briefs; and that the plaintiffs will and do hereby submit said motion for determination of the Court without argument.

January 23rd, 1904.

CATRON & GORTNER,
Attorneys for Plaintiffs.

In the District Court in and for the County of Santa Fe, in the Territory of New Mexico.

ELOISA L. DE BERGERE et al.
vs.
LUCIANO CHAVEZ et al.

Amended Replication.

Come now the plaintiffs, by leave of the Court first obtained and had, and by way of amendment to their replication herein, state:

1. As to the first plea of said defendants, as to which they have put themselves upon the country, plaintiffs do the like.

2. As to the second plea of said defendants, plaintiffs say they ought not by anything therein pretended or alleged, to be precluded from having or maintaining their aforesaid action against defendants or either of them, and say that said causes of action in the complaint herein mentioned did accrue to plaintiffs within ten years next before the commencement of this suit, in manner and form as plaintiffs have complained of the said defendants; all of which plaintiffs are ready to verify; wherefore, they pray judgment as in and by their complaint.

3. And, further, as to second plea of said defendants, plaintiffs say they ought not, by anything therein alleged, to be precluded from having or maintaining their aforesaid action against defendants or either of them, because they say the plaintiff, Eloisa L. de Bergere, became a feme covert in the year 1886, and remained under that disability up to the time of the commencement of this action and still so remains a feme covert, and that as to her under such disability, the alleged limitation plead by said defendants are ineffective and inoperative; the plaintiffs, Edward M. Otero, Adelina Otero and Manuel B. Otero, were minors and infants in the year 1883, when the estate and right of possession mentioned in the complaint descended to and fell upon them by the death of their father, Manuel B. Otero, and that they had not, nor had either of them, passed his majority by the period of one year, at the time of the commencement of said action, but still remained under the disability of infancy, and that as to them, the limitations plead by said defendants were and are ineffective and inoperative; that the adverse possession alleged by defendants, if any existed at any time, was not initiated prior to or during the year 1886, or prior to or during the year 1883, that as to the title existing in said plaintiff, acquired from Emilia Henriquez de Otero, the said Emilia Henriquez de Otero became femecovert in the year 1880, and continued under such disability until during the year 1892, and that no adverse possession pretended or set up by defendants was initiated against her or her predecessors in title, prior to her coverture as aforesaid, nor could any adverse possession be effective or operative against her during the period of such coverture, nor did any exist.

4. As to said plea of defendants, plaintiffs further say that the same is insufficient and improper as not pleading or showing that defendants have paid any or all taxes lawfully assessed against said property for the period of ten years; and plaintiffs expressly deny that said defendants have paid the taxes lawfully assessed against said property during such period.

5. And further as to said second plea of defendants, plaintiffs state that they ought not to be precluded, by anything therein alleged, because prior to the year 1899, the premises in the complaint mentioned were the subject of an unconfirmed inchoate claim of a grant alleged to have been made under the government of Mexico, prior to the acquisition of the Territory of New Mexico by the United States of America, and as such was not capable of being submitted to the jurisdiction of the courts of New Mexico in an action of ejectment, or in an action involving the title thereto, no jurisdiction existing in such courts primarily to dispose of the soil or to adjudge a title or right of possession of lands of the Government of the United States.

6. And further as to said plea and answer of defendants, plaintiffs deny generally and specifically each and every allegation thereof not hereby expressly admitted.

Santa Fe, N. M., Jan. 23rd, A. D. 1904.

CATRON & GORTNER,
Attorneys for Plaintiffs.

Which said amended replication is endorsed in words and figures as follows, to wit:

No. 4265. In the District Court in and for Sante Fe County, N. M. Eloisa L. de Bergere et al. vs. Luciano Chavez et al. Amended Replication. Filed in my office January 27th, 1904. A. M. Bergere, Clerk.

And thereafter, and on, to wit, the 23d day of March, A. D. 1906, there was filed and entered of record in the office of the said clerk of the First Judicial District in and for the County of Santa Fe, a certain order of court referring this said cause to Hon. E. A. Mann for final action, which said order is in words and figures as follows, to wit:

No. 4265.

LUCIANO CHAVEZ et al., Plaintiffs,
vs.
ELOISA L. DE BERGERE et al., Defendants.

Order.

Upon motion and consent of both plaintiffs and defendants, and because the undersigned judge deems himself disqualified to determine this cause, because of the interest therein of A. M. Bergere, the Clerk of the District Court presided over by the undersigned,

and both parties consenting that the same be referred to His Honor Edward A. Mann, Associate Justice, to act in lieu of the undersigned.

It is considered, ordered and adjudged that this cause be and the same hereby is referred for further action as may be necessary herein, to Hon. Edward A. Mann, Associate Justice, etc., to act in lieu and instead of the undersigned.

JOHN R. McFIE,
Judge, etc.

March 3rd, 1906.

Which said order is of record in Record J, page 203, of the Civil Record of the County of Santa Fe, First Judicial District, and the said order is endorsed in words and figures as follows, to wit:

No. 1265. Eloisa L. de Bergere et al. vs. Luciano Chavez et al. Filed in my office March 3rd, 1906. A. M. Bergere, Clerk.

And thereafter and on, to wit, the 30th day of August, A. D. 1906, there was filed in the office of the Clerk of said court a motion for a new trial, which said motion is in words and figures as follows, to wit:

District Court, Santa Fe County.

ELOISA L. DE BERGERE et al.
vs.
LUCIANO CHAVEZ et al.

Now come the defendants after findings of fact and conclusions of law made by the Court in said cause, and after the overruling of the exceptions of the defendants to the said findings and conclusions and after the denial of the findings requested by the defendants and before judgment, and move the Court to grant them a new trial of the said cause for the following reasons:

1. The Court erred in its first finding of fact because it is contrary to the evidence, and because it appears from the evidence that the Galisteo Ranch included other titles, independent of Manuel A. Otero, particularly excepted from the title conveyed to him, and which is defined in the contract of June 22, 1878, as the ranch which was formerly of the deceased Don Miguel E. Pino, from which certain interior tracts were excepted.

2. The Court erred in its second finding of fact because it is contrary to the evidence.

3. The Court erred in its fifth finding of fact because it is contrary to the evidence, because the acts of Sena y Baca and his privies in respect to the Galisteo Ranch were not consistent with the idea of the ownership of the dominant title thereto in Manuel A. Otero, on June 22, 1878, or at any time subsequent thereto, but at all times since said date was inconsistent with the idea of ownership of the dominant title thereto by the said Otero, and because the said finding is otherwise opposed to the evidence, as

to the kind and character of improvements upon the said land erected by the said Sena y Baca and his privies, and the time thereof.

4. The Court erred in its sixth finding of fact because it is not supported by the evidence, but is opposed thereby.

5. The Court erred in its seventh finding of fact because it is immaterial, irrelevant and incompetent from and inclusive of the words "but that before Congress took any action" down to the end of the paragraph, and because the contracting parties did not contract, in respect to time, with reference to an adjudication or approval by Congress as a principal but with reference to an adjudication and approval by the Surveyor General, an agent already in existence with authority to adjudicate and approve or recommend for confirmation land grants, whose powers in such respect are presumed to have been known by the contracting parties.

6. The Court erred in its tenth finding of fact because it is contrary to the evidence, and without support therein, which shows that the said agreement of June 22nd, 1878, established a present sale and transfer of the Galisteo Ranch, under the limitations of the title and extent thereof, by the reference to Don Miguel E. Pino's previous ownership thereof, with the exception of certain tracts therefrom, but with a sale and transfer of the same without formal deeds of conveyance to be given or executed unless the Bartolome Baca Grant should be adjudicated and approved as aforesaid.

7. The Court erred in its eleventh finding of fact because it is contrary to the evidence.

8. The Court erred in its twelfth finding of fact because it is contrary to the evidence and because the confirmation of the said grant was made for the heirs, legal representatives and assigns of the original grantees or allottees thereof, and because of the tracts so excepted from the alleged Manuel A. Otero title as shown in the proofs.

9. The Court erred in its thirteenth finding of fact because it is contrary to the evidence, and is not supported thereby.

10. The Court erred in its fourteenth finding of fact because it is contrary to the evidence and finds no support therein.

11. The Court erred in its first conclusion of law because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

12. The Court erred in its second conclusion of law, because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

13. The Court erred in its third conclusion of law, because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

14. The Court erred in its fourth conclusion of law, because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

15. The Court erred in its fifth conclusion of law, because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

16. The Court erred in its sixth conclusion of law, because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

17. The Court erred in its seventh conclusion of law, because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

18. The Court erred in refusing to sustain the exceptions of the defendants to its findings of fact and conclusions of law.

19. The Court erred in denying the motion of the defendants for findings of fact and conclusions of law in conformity with the defendants' exceptions to those made by the Court.

20. The Court erred in denying the motion of the defendants for particular findings of fact and conclusions of law.

21. The Court erred in sustaining the objection made to the defendants' offer of proof to show the plaintiffs' sale at a very great price of certain small holding interests in the Bartolome Baca Grant.

22. The Court erred in finding the issues in favor of the plaintiffs.

23. The Court erred in failing to find the issues in favor of the defendants.

24. The Court erred in not sustaining the motion of the defendants after the plaintiffs had rested their case in chief, for
18 the Court to find the issues in favor of the defendants.

25. The Court erred in sustaining the objection of the plaintiffs on page 37 of the record to the request of the defendants to have Clemente Ortiz sworn in surrebuttal as to the matters presented by the deposition of George H. King, to which ruling the defendants then and there excepted.

26. The Court erred in sustaining the objection of the plaintiffs on page 12 of the transcript of evidence to the question as to whether or not there were any conditions attached to defendants' Exhibit No. 5 on the part of Vaquita Ortiz.

27. The Court erred in sustaining the objection of the Pennsylvania Development Company and the plaintiffs' objection also to the question to the witness Hopewell, on page 56 of the transcript of the evidence, as to the control of certain papers, over the objection of the defendants.

28. The Court erred in sustaining the objection of the plaintiffs to the question as to whether or not the said papers could be presented otherwise than upon the consent of the witness Hopewell or of A. M. Bergere, a party to the escrow in question, over the exception of the defendants, because the said question was generally proper, and particularly proper, to learn in the beginning under what procedure the production of the said papers could be obtained as between the parties thereto, and for the purpose of qualifying the attitude of the witness, A. M. Bergere, in case he should
19 refuse his consent to the production of the said papers, as more particularly shown by the offer to prove in this connection.

29. The Court erred in sustaining, in spite of the exception of the defendants, the plaintiffs' objection, as not the best evidence to the question on page 56 of the transcript of the evidence concerning the

purported fact that the said papers represented a contract, etc., on the ground that the said question was proper and the evidence should have been admitted and particularly because the Court prevented the production of the best evidence, and then sustained this objection on the ground that it was not the best evidence, as more particularly shown by the offer to prove in this connection.

30. The Court erred in ignoring the offers to prove and refusing to permit the proof of the facts mentioned.

31. The Court erred in refusing to permit the attorney for the defendants to have inspection of the instruments referred to on page 57 of the transcript of the evidence, and in sustaining the objection of the personal counsel of the Pennsylvania Development Company.

32. The Court erred in inspecting the documents in question on page 57 of the transcript of the evidence without sight thereof being allowed to the attorney for the defendants, and in determining the admissibility and materiality of the said documents without permitting an inspection thereof by the attorney of the defendants.

33. The Court erred in its exclusion of the production of the said documents upon the examination of Rufus J. Palen.

34. The Court erred in its exclusion of evidence as to the said documents, and the production thereof, on the examination of the witness A. M. Bergere, at page 58 of the transcript of the evidence and in the offers of the defendants to prove the contents of the said escrow agreement.

35. The Court erred in sustaining the objection marked 22 on page 57 of the transcript of the evidence.

36. The Court erred in sustaining the objection marked 23 on page 57 of the evidence.

37. The Court erred in sustaining the objection marked 24th on page 57 of the transcript of the evidence.

38. The Court erred in sustaining the objection marked 25th on page 57 of the transcript of the evidence.

39. The Court erred in sustaining the objection marked 26th on page 58 of the transcript of the record.

40. The Court erred in determining from a private inspection of the memorandum on the back of the escrow agreement in question whether the contents were material or immaterial, competent or incompetent, without sight of inspection by defendants' counsel, thus excluding investigation thereof by the defendants, as shown on page 57 of the transcript of the evidence in the testimony of A. M. Bergere.

41. The Court erred in sustaining the objection marked 27 on page 58 of the transcript of the evidence of A. M. Bergere as to how and from whom and in what manner the said witness derained title to the land embraced in the said escrow agreement.

42. The Court erred in sustaining the objection of the plaintiffs to defendants' offer to prove by the witness Bergere that the title he had for lands embraced within the said escrow agreement he acquired by mesne conveyance by the plaintiffs in this suit, that the said lands are the same as those included in the small

holding claims in evidence and are based upon the Bartolome Baca Grant rejected.

43. The Court erred in sustaining the objection of the plaintiffs to the question to the witness Bergere as to source of whatever title he had in the lands embraced in the said escrow agreement.

44. The Court erred in sustaining the objection of the plaintiffs to the question to the witness Bergere as to what he relied upon for the lands which are the subject of the escrow agreement.

45. The Court erred in sustaining the objection of the plaintiffs to the question to the witness Bergere as to whether or not he based his claim to the lands being the subject of the said escrow agreement upon certain small holdings and certain deeds from persons claiming interests by reason of being tenants in common under the Bartolome Baca land grant rejected.

46. The Court erred in refusing to admit proof by the defendants through the witness Bergere of the same facts sought to be proved by the witnesses Hopewell and Pyburn, and the additional offer to prove by the said witness Bergere the particular fact that he purchased from the plaintiffs in this case whatever interest they might have had in the small holdings in question, and he thereupon made a contract and sold the said lands to the said Hopewell,

22 which said small holding rights, if any arose from the possessory right of Jesus Maria Serna y Baca to the Bartolome Baca Grant, and that thereby it will appear that the plaintiff seek to claim the ownership of all possessory rights under the Bartolome Baca grant that Jesus Maria Serna y Baca had without tendering back the Jesus Maria Serna y Baca's interests in the Bartolome Baca grant.

47. The Court erred in sustaining the plaintiffs' objection to the question addressed to the witness V. M. Bergere as to whether he had sold whatever the said lands to the said Hopewell other said small holdings to W. S. Hopewell, by means of said escrow agreement for the sum of $20,000 or thereabouts.

48. The Court erred in sustaining the plaintiffs' objection to the question addressed to the witness V. M. Bergere as to whether or not he had received of the purchase of $20,000 or thereabouts the sum of $10,800.

49. The Court erred in ruling that the escrow transaction was entirely outside of the case.

50. The Court erred in excluding legal evidence offered by the defendants, but in this respect the defendants cannot be more specific at this time, for the reason that certain objections of record have not been determined by the Court, but by agreement of counsel are to be determined hereafter by the Court with relation back to the time prior to the motion for a new trial herein.

51. The Court erred in admitting illegal evidence on the part of the plaintiffs over the objection of the defendants, that the

23 defendants cannot be more specific in this respect at this time for the reasons stated in the next preceding ground of motion.

A. B. RENEHAN,
Attorney for Defendants.

Which said motion for a new trial is endorsed in words and figures as follows, to wit:

No. 1265. District Court, Santa Fe County. Eloisa L. de Bergere et al vs. Luciano Chavez et al. Motion for a new trial. Filed in my office August 30th, 1906. A. M. Bergere, Clerk. A. B. Renehan, Santa Fe, N. M., Attorney for Defendant.

And thereafter and on, to wit, the 30th day of August, A. D. 1906, there was entered of record and filed in said court a certain order overruling the motion for a new trial, which said order is in words and figures as follows, to wit:

District Court, Santa Fe County, Territory of New Mexico, First Judicial District.

ELOISA L. DE BERGERE et al.
vs.
LUCIANO CHAVEZ et al.

This cause having come on to be heard this 30th day of August, 1906, upon the motion of the defendants for a new trial, after the making by the Court of findings of facts and conclusions of law herein, and before judgment, and the Court being fully advised in the premises:

It is ordered that said motion be and the same is, after the making of the said finding of fact and conclusions of law, and before judgment, overruled and denied, to which action of the Court the defendants then and there by their counsel, excepted.

EDWARD A. MANN,
Judge, etc., acting as herein in the capacity of the Judge of the First Judicial District.

Which said order overruling motion for a new trial is endorsed as follows, to wit:

No. 1256. District Court, Santa Fe County. Eloisa L. de Bergere et al vs. Luciano Chavez et al. Order overruling motion for new trial. Filed in my office August 30th, 1906. A. M. Bergere, Clerk. And is entered of record in Record J, Page 203 of the Civil Records of the County of Santa Fe, N. M.

And thereafter and on, to wit, the 30th day of August, A. D., 1906, there was filed and entered of record the findings and judgment in said cause, which said findings and judgment is in words and figures as follows, to wit:

In the District Court, County of Santa Fe, Territory of New Mexico.

ELOISA L. DE BERGERE et al., Plaintiffs,
vs.
LUCIANO CHAVEZ et al., Defendants.

Judgment.

This cause coming on to be heard, upon final judgment, and the Court being sufficiently advised in the premises, doth make the following finding of facts, to wit:

1. That the title to the tract of land in controversy, known as the "Galisteo Ranch" and hereinafter more particularly described up to June 22nd, 1878, was in Manuel Antonio Otero, he holding the same as an unconfirmed title from the Mexican government, by virtue of purchase and acquisition from the heirs or grantees of the original grant.

2. That up to this point there is no dispute as to the title, all the parties hereto tracing their claim of title to this common source, viz., the title of Manuel A. Otero.

3. That on June 22nd, 1878, Manuel A. Otero and one Jesus Maria Sena y Baca entered into a written contract in words and figures as follows:

Know all Men by these Presents, That I, the undersigned Manuel Antonio Otero, resident of the County of Valencia, in the Territory of New Mexico, for consideration have sold and transferred in favor of Jesus M. Sena y Baca and Agapita Ortiz, his wife, a ranch known as the Ranch of Galisteo, which is situated in the County of Santa Fe, and Territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino, and that I will give and execute the documents of conveyance of said ranch in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there shall be adjudication and approved by the Surveyor General the Grant of Bartolome Baca of a certain tract which was ceded him by the Governor Folgarez, the year 1849, and the which is situated in the County of Valencia and Territory of New Mexico and furthermore they will take possession of the aforesaid ranch and will have and enjoy all the products of the same, until the proper documents may be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me.

In witness whereof, we sign the present, in La Constancia, County of Valencia, this 22nd day of June, A. D. 1878.

MANUEL A. OTERO.
JESUS M. SENA Y BACA.

4. That under this contract Sena y Baca went into possession of the land in controversy, and remained in such possession until his death in 1885, when his rights descended to his widow and heir at law, Agapita Ortiz y Sena, who continued in possession until July

10th, 1888, when she deeded by quit-claim all her rights to one Jose D. Rumberg, at the same time delivering to him the original contract between Otero and her husband, both of which instruments Rumberg has placed of record. That Rumberg continued in possession until July 18th, 1889, when he quit-claimed his rights to Jose de La Cruz Chavez, at the same time delivering to Chavez the original contract between Otero and Sena y Baca.

5. That the present defendants are the heirs at law of Chavez and that the possession of his heirs, the said defendants, has been continuous from the time of his entry into the same until the commencement of this suit. That during all this time the possession of Sena y Baca and his privies has been continuous; they have farmed the land, made some improvements in the way of ditches and fences, and received the rents and profits, and have exercised all the possessory rights consistent with the claim of ownership, but all consistent with the right to possess and enjoy the property conferred by the said agreement of 1878. That the improvements placed upon the said property were incidental solely to the agricultural use of said property and consisted of fences and ditches solely; and that, in fact, no improvements were placed upon said property in the way of fencing by defendants or their predecessors until during the occupation by Rumberg, in 1888, and thereafter.

6. That there were no acts of hostile or adverse possession by Sena y Baca, nor by Agapita Ortiz de Sena, nor by the said Jesse D. Rumberg, nor by the said Jose de la Cruz Chavez, nor by the present defendants, until after the year 1897, but that the possession of said parties prior to 1897 was that of a vendee under an executory contract of sale, and in amity with the title of the said M. A. Otero, his heirs and devisees; that prior to 1897, neither the said defendant or their predecessors in title ever repudiated the said relation, nor asserted an adverse, open, notorious or hostile possession against the said Otero title, but all their acts and doings were consistent with the said relation, and in amity with the said title of Otero and his heirs and descendants.

7. That Manuel Antonio Otero attempted to get the "approval and adjudication" of the said Baca grant by the Surveyor General, but that he was never able to get a report made by that official favorable to said grant; but that on the contrary the Surveyor General in 1881 made a report to the Commissioner of the General Land Office recommending that that grant be rejected upon the proofs which had been submitted to him at that time; but that the Congress took any action upon this recommendation of the Surveyor General the Court of Private Land Claims was created and empowered by Congress to adjudicate the Spanish and Mexican land claims in this Territory, including the Baca Grant, and thereupon the descendants of Manuel Antonio Otero prosecuted their claim to the Baca Grant in that court, and the same was at one time by that court confirmed, but this confirmation was set aside, however, by the Supreme Court of the United States, and the Bartolome Baca Grant finally rejected in 1897 by that tribunal.

8. That in the meantime Sena y Baca, or his successors, prosecuted in the Court of Private Land Claims the confirmation of the original grant, and succeeded finally in getting that portion known as the "Galisteo Ranch," the property in controversy, confirmed, the same being only a small portion of the Galisteo Grant, as claimed for confirmation in said Court of Private Land Claims.

9. That after the final rejection of the Baca Grant and the final adjudication thereof, as aforesaid, plaintiffs, who are heirs of Manuel Antonio Otero, brought this action to obtain possession of the Galisteo Ranch.

10. That the agreement of 1878, above mentioned, was an executory contract for the deeding of the Galisteo Ranch to Sena y Baca upon the happening only of a certain contingency, which contingency has been extinguished, and that the said agreement was treated by the said Sena y Baca and his successors, Agapita Ortiz y
29 Jesse D. Rinaberg and Luciano Chavez and the present defendants, as an executory contract of sale only.

11. That the duplicate of said contract, which was returned by to said Sena y Baca, and transmitted down to the present defendants as aforesaid, was altered long after its execution by some person other than Sena y Baca, who wrote the original, so as to insert a valuable consideration of $1,000 into the same.

12. That the defendants herein in seeking and obtaining the confirmation of the Galisteo Ranch by the Court of Private Land Claims designed their alleged title in a chain necessarily passing through Manuel Antonio Otero, thus recognizing the common source of title and that no claim is made by defendants to the land in question except by or through Manuel Antonio Otero, in whom the title was absolute, for the purpose of this case, at the time of the making of the agreement of 1878.

13. That the transaction between Manuel Antonio Otero and Jesus M. Sena y Baca in 1878 simply amounted to an interchange or exchange of these tracts of land, namely, the Galisteo Ranch for the interest of Sena y Baca in the Baca Grant, the exchange of possession passing with the contract, and the conveyance to be made and the deal finally consummated when the Baca Grant was adjudicated and approved.

14. That the damages of plaintiffs herein by reason of the unlawful detention of the said property from plaintiffs by defendants is the sum of four hundred and fifty dollars ($450), which amount is hereby found and assessed to be the damages of plaintiffs herein.

And upon the facts found as aforesaid the Court doth conclude as matter of law that the said contract between Manuel
30 Antonio Otero and Jesus M. Sena y Baca was an executory contract of sale, and that the title to the said Galisteo Ranch remained in the said Manuel Antonio Otero, his heirs and assigns until such time as the Baca Grant might be adjudicated and approved; that the relation of vendor and vendee was hereby fixed and the possession of the said Sena y Baca and his successors, down to the present defendants, became a possession in amity with the title of the said Otero, his heirs and descendants; that the said de-

fendants have not, nor have their predecessors, asserted or had or held any adverse, hostile, open, notorious or exclusive possession of the said property, against the title of plaintiffs and their predecessors, except since the year 1897, and at the time of commencing this action, at which time defendants were asserting hostile, adverse title to the plaintiffs and their predecessors; and that the possession of said defendants and their predecessors, prior to 1897, was consistent with the title of said Manuel Antonio Otero and his successors, and constructively their possessions in and to said property; that plaintiffs were on the day named in the complaint entitled to the possession of the said premises and each and every part thereof, as against the said defendants and each thereof; that the said defendants are guilty of having entered into said premises and unlawfully withholding the same from plaintiffs, and that they still wrongfully and unlawfully withhold the same and the possession thereof from plaintiffs, and that the defendants are not entitled to the possession of the said premises, or any part thereof, as against the said plaintiffs; and that plaintiffs are entitled to recover the possession of the said premises, together with their damages as hereinbefore found and assessed, of and from the said defendants.

And thereupon upon the making of the foregoing findings of fact and conclusions of law defendants except thereto as per their written exceptions now filed and presented, which said exceptions having been heard by the Court are overruled; to which ruling defendants again except; and thereupon defendants file motion for further findings, as per their said motion now filed, and the same having been heard by the Court, is overruled; to which ruling of the Court defendants then except.

It is therefore considered, ordered and adjudged that the said plaintiffs, Eloisa Luna de Bergere, Alfred M. Bergere, her husband, Edward, Adeline and Manuel B. Otero, do have and recover of and from the said defendants, Luciano Chavez, Apolino Chavez, Gregorio Chavez, Asceusion Chavez, Antonio Sandoval, Margarita Chavez, Rosario Rodriguez de Chavez, the possession of the said premises, to-wit: a parcel of land and real estate situate, lying and being in the County of Santa Fe, aforesaid, and known as and commonly called "the Galisteo Grant," the extent, location and boundaries of the same being as follows:

Beginning at the northeast corner of the survey thereof by Albert H. Easley, made under the direction of the Surveyor General of the United States for the Territory of New Mexico, and remaining on file in the office of the said Surveyor General; thence north seventy-seven degrees fifteen minutes west, to the east side of the old reservoir site of the people of Galisteo; thence, first in a southerly direction and afterwards in a northwesterly direction following the meanders of the edge of said reservoir site, in such manner as to exclude the same, to the northeast corner of an old stone wall constituting the east and north boundary of the allotment made in said grant to one Matias Sandoval; thence, following said stone wall in a southerly and westerly direction until the

same intersects the east boundary of the homestead entry No. 3450 patented to Rafael Ortiz on January 11th, 1897; thence south along said east boundary to the north bank of the Galisteo river; thence in an easterly direction following the meanders of said river to a junction with the Arroyo Atascoso, or Rio de San Cristobal; thence crossing the Galisteo river in an easterly direction to the north bank of said Arroyo Atascoso; thence, following said north bank in an easterly direction to the east boundary of said survey by said Easley; thence, in a right line to the point of beginning; being the same premises indicated by letters A, B, C, D, E, F, G, H, I, J, K, L, and M on plat attached as Exhibit "A" to objections filed by the United States to the survey of the said Easley in case No. 54 in the Court of Private Land Claims of the United States, in and for the Territory of New Mexico, in a certain cause therein entitled Luciano Chavez et al. vs. The United States of America.

And it is further considered, ordered and adjudged that the said plaintiffs do have and recover of and from said defendants their damages in the sum of four hundred and fifty dollars as hereinabove found and assessed, together with legal interest thereon from the date, and the costs of this action, and that the writs of possession and execution issue herein, etc., therefor.

EDWARD A. MANN,
Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Sixth Judicial District Court of said Territory, sitting herein in lieu of Hon. John P. McFie, Associate Justice of said Supreme Court and Judge of the First Judicial District Court in and for said County of Santa Fe, disqualified, said cause having been submitted to the above signed for decision by parties in lieu of said Judge McFie.

August 30th, 1906.

Which said findings and judgment is endorsed in words and figures as follows, to wit:

No. 4265. District Court, Santa Fe County. Eloise L. de Borgo vs. Luciano Chavez et al. Findings and judgment. Filed in my office August 30th, 1906. A. M. Borgere, Clerk. And entered of record on page 206 to 208, inclusive, on Record J, of the Civil Record of the County of Santa Fe, Territory of New Mexico.

And thereafter and on, to wit, the 30th day of August, A. D. 1906, there was filed in the office of the Clerk of the said District Court of the First Judicial District of the Territory of New Mexico exceptions to judgment, and motion for appeal, which said exceptions and motion for appeal is in words and figures as follows, to wit:

District Court, Santa Fe County, Territory of New Mexico, First Judicial District.

ELOISA LUNA DE BERGERE et al.
vs.
LUCIANO CHAVES et al.

Now comes the defendants in said cause and except to the judgment of the Court therein, and pray an appeal therefrom to the Supreme Court of the Territory of New Mexico with such proper bond as the Court may fix, in supercession of the said judgment.

A. B. RENEHAN,
Attorney for Defendant.

Which said exceptions to judgment and motion for appeal is endorsed in words and figures as follows, to-wit:

No. 1057. Santa Fe County. Eloisa L. de Bergere et al. vs. Luciano Chavez et al. Exceptions to judgment and motion for appeal. Filed in my office August 20th, 1906. A. M. Berger, Clerk.

And thereafter and on, to-wit: the 20th day of August, A. D. 1906, there was filed in the office of the Clerk of the District Court of the First Judicial District of the Territory of New Mexico, sitting in and for the County of Santa Fe an order allowing appeal and fixing bond, which said order is in words and figures as follows, to-wit:

District Court, Santa Fe County, Territory of New Mexico, First Judicial District.

ELOISA LUNA DE BERGERE et al.
vs.
LUCIANO CHAVEZ et al.

This cause having come on to be heard this 20th day of August, 1906, upon the motion of the defendants praying an appeal from the judgment of the Court thereof to the Supreme Court of the Territory of New Mexico, and for the fixing of an appeal bond in supercedeas of the said judgment, and the Court being fully advised in the premises,

It is ordered that an appeal be and it is hereby granted to the defendants from the said judgment to the Supreme Court of the Territory of New Mexico, and bond in appeal is hereby fixed in the sum of fifteen hundred dollars, to be conditioned according to law, and approved by the undersigned.

EDWARD A. MANN,
Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Sixth Judicial District, Acting in the Incapacity of the Judge of the First Judicial District Court, as Before.

Which said order allowing appeal is endorsed in words and figures as follows, to wit:

No. 1265. Santa Fe County. Eloisa L. de Bergere et al. vs. Luciano Chavez et al. Order allowing appeal and fixing bond. Filed in my office August 20th, 1903. A. M. Bergere, Clerk.

And which said order is of record on page 203 of the Civil Record J of the County of Santa Fe and Territory of New Mexico.

And thereafter and on, to wit, the 19th day of November, A. D. 1903, there was filed in the office of the Clerk of said court an appeal bond, which said appeal bond is in words and figures to wit:

Know All Men by These Presents: That we, Luciano Chavez as principal, and Apolonio Chavez and Gregorio Chavez and Ascension Chavez and Jose Ortiz as his sureties, are held and firmly bound unto Eloisa Luna de Bergere, Alfred M. Bergere, Edward
36 Otero, Adelina Otero and Manuel B. Otero, and Alfred M. Bergere, guardian of the persons and estates of Edward Otero, Adelina Otero and Manuel B. Otero, minor children of Manuel B. Otero, deceased, in the penal sum of One Thousand Five Hundred Dollars, to the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

But the foregoing obligation is upon conditions as follows, to wit:

Whereas, in that certain cause heretofore pending in the District Court of the First Judicial District of the Territory of New Mexico for the County of Santa Fe, numbered 1265, on the civil docket thereof, wherein Eloisa Luna de Bergere, Alfred M. Bergere, Edward, Adelina, and Manuel B. Otero, alleged to be minor children of Manuel B. Otero, deceased, by Alfred M. Bergere, guardian of the persons and estates of the said alleged minor children, were plaintiffs, and Luciano Chavez, Apolonio Chavez, Gregorio Chavez, Ascension Chavez, Antonio Sandoval, Magdalena Chavez and Rosario Rodriguez de Chavez were defendants, final judgment was heretofore entered in favor of the plaintiffs and against the defendants, and the defendants feeling aggrieved by said judgment heretofore prayed and were allowed an appeal from the said judgment to the Supreme Court of the Territory of New Mexico, bond in appeal and supersedeas being fixed in the sum of One Thousand Five Hundred Dollars.

Now, therefore, if the said defendants shall prosecute their said appeal with due diligence in the said Supreme Court, and if the judgment appealed from be affirmed, or the appeal dismissed,
37 will perform the judgment of the said District Court, and pay all damages and costs adjudged against them in the said Supreme Court on such appeal, then this obligation shall be null and void, but otherwise it shall be and remain in full force and effect.

In witness whereof, the said principal and his sureties have hereunto set their hands this 10th day of November, A. D., 1906.

$500.00. his
LUCIANO x CHAVEZ.
mark.

$500.00. APOLONIO CHAVEZ.

$500.00. his
GREGORIO x CHAVEZ.
mark.

$500.00. his
ASCENSION x CHAVEZ.
mark.

$500.00. JUAN ORTIZ.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

On this 10th day of November, 1906, before me personally appeared Luciano Chavez, the principal, and Apolonio Chavez and Gregorio Chavez and Ascension Chavez and Juan Ortiz, the sureties on the foregoing bond, to me well known to be the same persons described in and who executed the foregoing obligation, and acknowledged to me that they executed the same as their free act and deed for the uses and purposes therein expressed; and the said sureties, to-wit: the said Apolonio Chavez and Gregorio Chavez and Ascension Chavez and Juan Ortiz, being by me first duly sworn upon 38-11 their several oaths each for himself and not one for the other, did say that he is worth the sum of money noted opposite to his signature to the said obligation; in real or personal property, and both situate in the Territory of New Mexico, over and above his just debts and liabilities and the amount exempt by law from execution.

In witness whereof, I have hereunto set my hand and notarial seal the day and year in this certificate first written.

[SEAL.] JOSE ORTIZ Y PINO,
Notary Public.

Approved by me this 11th day of November, A. D., 1906.

EDWARD A. MANN,
Associate Justice, etc., and Judge etc., Acting in the Incapacity of Hon. John R. McFie, Associate Justice, etc., and Judge of the First Judicial District Court.

O. K.
CATRON & GORTNER.

Which said appeal bond is endorsed in words and figures as follows, to wit:

No. 1265. Santa Fe County. Eloisa L. de Bergere et al. vs. Luciano Chavez et al. Appeal bond. Filed in my office November 9th, 1906. A. M. Bergere, Clerk.

15 In the District Court of the First Judicial District of the Territory of New Mexico, Santa Fe County.

ELOISA L. DE BERGERE et al., Plaintiffs,
vs.
LUCIANO CHAVEZ et al., Defendants.

Opinion.

This is a suit in ejectment, brought by the plaintiffs in Santa Fe County for the possession of a certain tract of land lying therein, which is held by the defendants under a claim of title.

The suit was brought in the District Court of Santa Fe County and referred to the undersigned for decision on the death of McFie, J. disqualified. The material facts, as they appear from the voluminous transcript of the evidence, are as follows:

The title to the tract of land on controversy, known as the "Galisteo Ranch," up to June twenty second, 1878, was in Manuel Antonio Otero, he holding it as the grantee of the original
16 grant, and up to this initial point there is no dispute as to the title, all the parties hereto trace their claim of title to the common source, viz.: the title of Manuel A. Otero. On the day mentioned Manuel A. Otero, and one Jesus M. Sena y Baca entered into a written contract, which is as follows:

Know all men by these presents: That I, the undersigned Manuel Antonio Otero, resident of the County of Valencia, in the Territory of New Mexico, for consideration have sold and transferred in favor of Jesus M. Sena y Baca and Agapita Ortiz, his wife, a ranch known as the Ranch of Galisteo, which is situated in the County of Santa Fe and Territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino, and that I will give and execute the documents of conveyance of the said ranch in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there shall be adjudicated and approved by the Surveyor General the Grant of Bartolome Baca of a tract which was ceded him by the Governor Melgarez the year 1819, and the which is situate in the County of Valencia in the Territory of New Mexico, and furthermore, they will take possession of the aforesaid ranch and will have and enjoy all the products of the same until the proper documents may be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me.

In witness whereof, we sign the present, in La Constancia, County of Valencia, this 22nd day of June, A. D., 1878.

MANUEL A. OTERO
JESUS M. SENA Y BACA.

17 Under this contract Sena y Baca went into possession of the land in controversy and remained in such possession until his death in 1885, when his rights descended to his widow and heir at law, Agapita Ortiz de Sena, who continued in possession as

til July 10th, 1888, when she deeded by quit-claim deed all her rights to one Jesse D. Rumberg, at the same time delivering to him the original contract between Otero and her husband, both of which instruments Rumberg had placed of record. Rumberg continued in possession until July 18th, 1899, when he quit claimed his rights to Jose de La Cruz Chavez, at the same time delivering to Chavez the original contract between Otero and Sena y Baca. The present defendants are the heirs at law of Chavez and the possession has been continuous from the time of his entry into the same until the commencement of this suit. During all this time the possession of Sena y Baca and his privies as being continuous, they have farmed the land, made some improvements in the way of ditches and fences, have received the rents and profits and have exercised all the necessary rights consistent with a claim of ownership. It appears that Manuel Antonio Otero attempted to get the approval and confirmation of the Baca Grant by the Surveyor General, but was never able to get a report made by that official favorable to the Grant, but that on the contrary the Surveyor General, in 1881, made a report to the Commissioner of the General Land Office recommending that grant be rejected upon the proofs which had been submitted to him at that time. Before Congress took any action upon this re-

48 commendation of the Surveyor General, the Court of Private Land Claims was created and empowered by Congress to adjudicate the Spanish and Mexican Land Grants, including the Baca Grant, and the Otero prosecuted their claim to the Baca Grant in that Court, which was at one time by that Court confirmed; this confirmation was set aside, however, by the Supreme Court of the United States and the Bartolome Baca Grant finally rejected in 1895.

In the meantime Sena y Baca and his successors prosecuted in the Court of Private Land Claims the confirmation of the original Galisteo Grant and succeeded finally in getting that portion known as the "Galisteo Ranch," the property in controversy, confirmed. After the final rejection of the Baca Grant the plaintiffs, as heirs of Manuel Antonio Otero, brought this suit to obtain possession of the Galisteo Ranch.

The questions discussed by counsel in their briefs and raised by the record are numerous and involve complicated questions of law, many of which, in my judgment, may be eliminated by a careful analysis of the real questions at issue. In my judgment there is no great conflict as to the material facts and many pages of the voluminous record are taken up by collateral matters, immaterial to the real issues.

The questions which appear to me to be the material ones to be solved are:

1st. What was the nature of the contract between Manuel Antonio Otero and Jesus Sena y Baca in 1878?

2nd. Under that contract what was the relation of the parties and the nature of the possession of the Galisteo Ranch by Sena y Baca and his successors in title?

3rd. When such relations ceased, if ever, and such possession became adverse and hostile to the plaintiffs?

4th. Whether the plaintiffs can maintain ejectment without joining their tenants in common as a party?

As to the contract between Otero and Sena y Baca (which is set out in full in the statement of facts), I am clearly of the opinion that it was an executory contract for the transfer of the Galisteo Ranch to Sena y Baca upon the happening of a certain contingency, to wit, the adjudication and approval of the Bartolome Baca Grant. The wording of the instrument is clear and unequivocal that the deed of conveyance was to be then made, and the fact that it was executed and signed by both parties and not merely by a grantor, that the rights of possession and the enjoyment of the products of the place during the interim was expressly given to Sena y Baca, seems to conclusively establish the nature of the contract.

Again, the fact that only non-claim deeds conveying the right of possession were given to the successor of Sena y Baca and the original contract given which such deeds show that the original parties to the contract and their successors recognized it as an executory contract only.

In Williams vs. Paine 169 U. S. 55, the Court (p. 76) says:

"We agree generally that although there are words of conveyance in the writing, as a contract for the purchase and sale of lands, and if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey, and not a conveyance. The whole question is one of intention to be gathered from the instrument itself."

Citing Jackson vs. Montrief, 5 Wend. 293;
Ogden vs. Brown, 33 Penn. St., 247;
Phillips vs. Swank, 120 Penn. St., 76.

In the case of Jackson vs. Montrief, supra, cited with approval by the Supreme Court of the United States, we find the following language by the Court:

"In my opinion the contract was an agreement to convey only, and not a conveyance. It contains words of present purchase and sale, but those words must be construed in reference to the whole instrument, and by the concluding paragraph it is clear that regular conveyances by both parties were contemplated in the consummation of a contract which, until such conveyances should be executed, was inchoate. The possession was changed, but no title passed out of either of the contracting parties. The Judge was certainly right therefore, in deciding that the legal title remained in the lessee. The defendant was a quasi tenant at will."

In this connection I might add that from my point of view it is immaterial whether the contract read originally as contended by plaintiffs, or as claimed by defendants, although I have given the one claimed by plaintiffs, as I believe the evidence, including the appearance of the instrument, recorded by Rumberg, justifies the conclusion that the same was altered long after its execution by some person other than Sena y Baca, who wrote the original, but be that

as it may, the alteration, if any, refers only to the consideration, and does not change the nature of the contract.

51 If then the contract was an executory one, merely, the possession of Sena y Baca and his successors in interest was not adverse or hostile to that of Otero, and his heirs, but was consistent with their claim of title and constructively their possession, unless by some act of hostility known to the Oteros this relation was changed.

"Where one enters into and holds possession of lands under an executory contract to purchase, or bond for title, the entry and possession are in subordination to the title of the vendor until the payment or performance of all the conditions by the vendee, or until the vendee has distinctly and unequivocally repudiated the title of his vendor, which repudiation is brought expressly or by legal implication to the vendor's knowledge."

"There are also a number of decisions in which it is held that a party entering into possession under an agreement to purchase can not dispute the title of him under whom he enters until after the surrender of the possession."

1 Cyc. 1041, citing numerous authorities from the courts of the different states.

Sweatzer Lewis vs. Hawkins et al. 23 Wall. 119;

Hardin vs. Boyd 113 U. S. 765;

Kirk vs. Smith 9 Wheat. 241 (p. 286);

Barr vs. Gratz 4 Wheat. 212.

The evidence in this case shows that Sena y Baca in obtaining the confirmation of the Galisteo Grant, designed his title through Manuel Antonio Otero, thus recognizing the title of his vendee and depending upon it for his own right. No claim was made by the defendants to the land in question except by and through Manuel A. Otero.

52 Unless there has been a change in these relations and the possession of the defendants has been adverse to that of plaintiffs for the statutory period, it would seem that defendants would have no right to the land in question.

I cannot see that anything has transpired to change the relation of the parties as it existed upon the execution of the contract. I think it fair, and in fact, the only logical construction of the intention of the parties, as shown by the contract, is that they simply meant to trade these tracts of land, the Galisteo Grant for the Barrotaux Baca Grant, the exchange of possession passing with the contract, the conveyance to be made and the deed finally consummated when the Baca Grant was adjudicated and approved. To be sure, the contract read "by the Surveyor General," but it is well settled that the Surveyor General was never empowered to adjudicate land grants.

Ortiz vs. U. S. 176 U. S. 127.

I think this construction comes fairly within the rules laid down by the Supreme Court of this Territory in Joseph vs. Catron, 84 Pac. 439. In that case the agreement was to pay a certain sum of

money "upon the confirmation by the Congress of the United States" of a certain grant. The confirmation of the grant (or a portion of it) was made by the Court of Private Land Claims, to whom Congress had delegated that power, and the defendant pleaded that the agreement had not been complied with, because the confirmation was not by Congress. The Supreme Court of the Territory, speaking through Mr. Justice Pope, says:

"We accordingly hold that the purpose of this contract was
53 the payment of the amount named upon the confirmation of the grant, whether by act of Congress specially applicable to this grant, or by act of Congress providing for the submission of this and other grants to competent tribunals, which, after due investigation might grant a confirmation."

By analogy, I believe that this contract in question means an adjudication and approval by the tribunal having the power to adjudicate and approve a contingency that never was fulfilled, and that consequently the consideration for the contract failed, so far as plaintiffs are concerned.

According to this view no adverse possession was ever had of this tract by defendants, at least until the final adjudication of the Pueblo Grant by the Supreme Court of the United States, which was less than ten years prior to the beginning of this action, and it is a serious question in my mind whether it became adverse at that time, unless there was an actual change in the nature of the possession or a repudiation of the Otero title, but this is immaterial, and I shall not discuss that point. It seems to be the well settled rule that actions in ejectment may be brought by tenants in common, either jointly or separately. The Supreme Court of the United States in Davis vs. Collins, 174 U. S., 719, quotes with approval from 12 D. C. App., 51 to 60, as follows:

"The original rule at common law was that tenants in common could only sue separately, because they were supposed seised per
54 and Pr., 316, and cases cited. This seems to have been the practice in the District of Columbia, and, so far as we are advised, has never been questioned. Tenants in common may join in an action if they prefer to do so, but it is with the risk of the failure of all of them if one fail to make out a title or right of possession," and, the Supreme Court adds, "These remarks state the rule correctly."

In the notes to Marshall vs. Palmer, 50 Am. St. Rep., 838, case, by the way, holding adversely, Judge Freeman says: "The second question seems to be easily disposed of upon principle, and we think that there is no dissent from the proposition that one cotenant, irrespective of the nature of the cotenancy, is, as against all strangers thereto, entitled to the exclusive possession of all the property thereof. Hence we draw the inference that his remedy ought to correspond to his rights, and that whenever a stranger has the title unlawfully seized or held possession of the property, either

cotenants might recover such possession and procure a writ absolutely excluding the intruder from the possession of the property. These views are certainly endorsed by the decided majority of American decisions on the subject. (Citing numerous decisions.) To hold otherwise is, in effect, to deny to cotenants plaintiff any substantial relief, for if he may not recover the possession of the whole from the trespasser and exclude the latter absolutely from the possession of the premises, his recovery is of little or no value, for if a stranger to the title be conceded to have a right to remain in possession, such right extends to every part and parcel of the property, and may prevent the part owner who has recovered
55 judgment from making any profitable use, either of the land or of any interest therein."

The writer then says that despite this reasoning there is a growing tendency to hold the other way, and cites a few authorities, but I believe the rule stated is the better one, founded as it is upon sound common sense and established principles of law.

I am aware that there are many questions raised in the briefs of counsel which I have not touched upon, but I believe I have based upon all that is necessary to a decision of this case. If the contract between Otero and Sena y Baca was an executory contract until the final adjudication of the Baca Grant, then all the nice questions of disabilities under the statutes of limitation and the doctrine of presumption of title do not arise in this case and as such in my view I have not attempted to discuss them, but rather to simplify the questions involved in order to arrive at an early decision in the case.

In conformity to the views herein expressed judgment will be formally entered for the plaintiffs for the possession of the property described in the complaint and for damages in an amount equal to one-third of the rent since the year 1895.

Dated at Mamigordo, New Mexico, August 3rd 1905.

EDWARD A. MANN,
Associate Justice, &c.

District Court, Santa Fe County.

ELOISA L. DE BERGERE et al.
vs.
LUCIANO CHAVES et al.

56 Now come the defendants, before judgment, and except to the findings of fact made and conclusions of law drawn by the Court herein, as follows:

1. To the first finding of fact, because it is contrary to the evidence, and because it appears from the evidence that the Galisteo Ranch included other titles, independent of Manuel A. Otero, particularly excepted from the title conveyed to him, and which is defined in the contract of June 22, 1878, as the ranch which was formerly of the deceased Don Miguel E. Pino from which certain interior tracts were excepted.

2. To the second finding of fact because it is contrary to the evidence.

3. To the fifth finding of fact because it is contrary to the evidence, because the acts of the Sena y Baca and his privies in respect to the Galisteo Ranch were not consistent with the idea of the ownership of the dominant title thereto in Manuel A. Otero, on June 22, 1878, or at any time subsequent thereto, but at all times since said date was inconsistent with the idea of ownership of the dominant title thereto by the said Otero, and because the said finding is otherwise opposed to the evidence, as to the kind and character of improvements upon the said land erected by Sena y Baca and his privies and the time thereof.

4. To the sixth finding of fact because it is not supported by the evidence, but is opposed thereby.

5. To the seventh finding of fact because it is immaterial, irrelevant and incompetent, from and inclusive of the words, "that that before Congress took any action" down to the end of the paragraph, and because the contracting parties did not contract, in respect to time, with reference to an adjudication or approval by Con-
55 gress, as a principal, but with reference to an adjudication and approval by the Surveyor General, an agent already in existence, with authority to adjudicate and approve or recommend for confirmation land grants, whose powers in such respects are presumed to have been known by the contracting parties.

6. To the tenth finding of fact because it is contrary to the evidence and without support therein, which shows that the said agreement of June 22, 1878, established a present sale and transfer of the Galisteo tract, under the limitations of the title and extent thereof by the reference to Don Miguel E. Pino's previous ownership thereof, with the exception of certain tracts therefrom, but was a sale and transfer of the same, without formal deeds of conveyance to be given or executed unless the Bartolome Baca Grant should be confirmed and approved as aforesaid.

7. To the eleventh finding of fact because it is contrary to the evidence.

8. To the twelfth finding of fact because it is contrary to the evidence and because the confirmation of the said grant was made for the heirs' legal representatives and assigns of the original grantee or all other thereof, and because of the tracts so excepted from the alleged Manuel A. Otero's title as shown in the proofs.

9. To the thirteenth finding of fact because it is contrary to the evidence.

10. To the fourteenth finding of fact because it is contrary to the evidence.

11. To the first conclusion of law because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

58 12. To the second conclusion of law because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

13. To the third conclusion of law because it is contrary to the

law, contrary to the evidence, and contrary to the law and the evidence.

14. To the fourth conclusion of law because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

15. To the fifth conclusion of law because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

16. To the sixth conclusion of law because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

17. To the seventh conclusion of law because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

And to the conclusions of law the defendants particularly except as follows: Because the said contract was not executory, but a present sale and transfer, with a promise of more formal documents upon contingency, but without any covenant or agreement, express or implied, on the part of Senaz Baca or his privies for the redelivery or surrender of said grant or ranch to Otero or his privies in case of the failure of the contingency, and because the language of said contract contains no promise whatsoever showing or tending to show that the disapproval of said ranch by the Surveyor General would work the forfeiture or dispossession in law of Senaz Baca; because the relation of vendor and vendee was not thereby created, nor was the possession of Senaz Baca and his privies as tenants with Otero and his privies, but was adverse to them by reason of said contract and also by reason of their acts in pais, because the evidence shows that the acts of Senaz Baca and his privies were at all times those of the owners of the fee, and were at least such as constitute full and complete adverse possession under the statute of limitations, and because the evidence shows that the plaintiffs at motion, June 22, 1878, have been entitled to the possession of said premises, or any part thereof, or that the defendants have wrongfully or unlawfully withheld the same from them. The Court is moved to amend said findings of fact and conclusions of law and to make findings of fact and conclusions of law in conformity with these exceptions.

And the Court is further moved to find for the defendants as follows:

a. That even though the said contract were executory at the time it was made, thereafter some action was taken between the parties thereto whereby all the right, title and interest of Manuel A. Otero was vested by him in Jesus Senaz Baca.

b. That Manuel A. Otero acknowledged that his sale and transfer of the said ranch to Senaz Baca was absolute and without conditions as late as the year in which he died, and thus declared against interest in the same.

c. That no demand of possession of the said ranch was made of the defendants or any of them by the plaintiffs or any of them prior to the institution of this suit.

d. That no tender to the defendants or to Agapita Otero de Sena, the widow, heir, joint tenant or tenant in common of Jesus Ma. Sena y Baca, to the Galisteo ranch and grant under said contract, by the plaintiffs or any of them, was ever made or made previous to the beginning of this suit, of the Bartolome Baca grant, or any part or interest thereof, or of the possession of the plaintiff or parts thereof, as claimed for confirmation under the state holding acts.

e. That if the said contract was executory the rejection of the Bartolome Baca grant in 1881, during the lifetime of Manuel A. Otero gave to him a right of re-entry immediately upon such rejection, inasmuch as the time of the decision of the Surveyor General, or his recommendation to the premises, was in contemplation of the contractors, and not final action of Congress and the statute of limitations then started to run against him and his privies, and in this time interposed a bar to the maintenance of this suit.

f. The fact that the deed of Sena y Baca to the Bartolome Baca grant to Manuel A. Otero is later in date than the contract between Sena y Baca and Manuel A. Otero for the Galisteo ranch or grant in the light of all the testimony, induces the Court to believe and say that subsequently to June 22, 1878, Manuel A. Otero absolutely divested himself of all right, title and interest in the Galisteo ranch or grant for and in consideration of the transfer to him by Sena y Baca of the latter's interest in the Bartolome Baca grant.

g. That if Congressional action upon the title of the Bartolome Baca grant was contemplated by the contractors in the agreement of June 22, 1878, Congress has not lost jurisdiction in the premises, but may still pass thereon and this suit is premature.

h. That the title and claim of Don Miguel E. Pino to the Galisteo ranch contained reservations and exceptions of certain tracts with the confirmation thereof, and the claim and title of Manuel A. Otero to the said ranch was and is at all times hereto subject to the same reservations and exceptions, under the said agreement of June 22, 1878; and otherwise, as the plaintiffs have not excluded such reservations and exceptions from the bar of this suit, and have not shown that the Galisteo ranch or grant as finally confirmed is not identical with such reservations or exceptions, or is not other land within the claimed boundaries of the Galisteo ranch or grant as presented for confirmation. In addition, the defendants do not disclaim title exclusively through Manuel A. Otero, but claimed other interests in the Galisteo grant which the plaintiffs have not shown are the same as the land described in the complaint or declaration. Besides numerous tracts of land were within the claimed boundaries of the ranch or grant which the plaintiffs have not shown to be different from the lands in question.

i. In this case, upon presumption, the Court finds, as matter of policy, as well as of convenience and necessary for the peace and security of society, in view of the long possession and use of the ranch herein, that Jesus Ma. Sena y Baca, his privies and assigns, that a valid grant and deed for said ranch was made conveying the same in fee simple to Jesus Ma. Sena y Baca or his grantee.

k. The interlineations and erasures in plaintiffs' No. 4 and defendants' No. 5 are presumed to have been made prior to its execution.

l. The plaintiffs are estopped by laches to recover.

l. That Manuel A. Otero interpreted the said contract of June 22, 1878, as an absolute conveyance.

m. That the Galisteo grant was perfect at the time of the treaty of Guadalupe Hidalgo.

n. That the plaintiffs have not connected themselves by priority of contract with the original allottees of the Galisteo grant or ranch.

o. That in any event the possession of Jesus Ma. Sequra Baca of said ranch was originally lawful, as well as that of his successor in interest therein, and no demand having been made upon the defendants to give up the possession, and no notice having been given to them to quit, this suit cannot be maintained.

The Court concludes as matter of law that the plaintiffs should take nothing by their action, but that the defendants should go hence without delay.

A. B. RENEHAN,
Attorney for Defendants.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

I, A. M. Bergere, Clerk of the District Court of the First Judicial District of the Territory of New Mexico, in and for the County of Santa Fe, do hereby certify that the above and foregoing is a true and correct transcript of record of the above entitled cause as the same remains on file in my office in accordance with the defendants' and appellants' exercise therein filed.

Witness my hand and the seal of said Court at my office at Santa Fe, New Mexico, this 27th day of November, A. D. 1906.

[SEAL.]

A. M. BERGERE,
Clerk of the District Court First Judicial District of the Territory of New Mexico in and for the County of Santa Fe.

And afterwards, on to wit: on the twenty eighth day of December, A. D. 1906, there was filed in the office of the Clerk of the Supreme Court of the said Territory of New Mexico a motion by appellant, which said motion was and is in words and figures following to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D., 1907.

No. 1180.

ELOISA L. DE BERGERE et al. Appellees,
vs.
LUCIANO CHAVES et al., Appellants.

Appeal from District Court, Santa Fe County.

Now comes the appellants by A. B. Renehan their attorney, and move the court for sixty days further time within which to file the printed transcript, assignment of errors and briefs in said cause for the following reasons:

1. The said cause was begun in the District Court wherein it was tried on the 3rd day of April, A. D., 1901.

2. The trial thereof was originally completed on the 5th day of March, A. D., 1902.

3. It was re-opened on the 17th day of February, 1903, for the admission of further proofs, on the motion of the plaintiffs.

4. It was re-opened on March 3, 1903, for the admission of further proofs on the motion of the plaintiffs.

5. The taking of testimony was concluded December 31, 1903.

6. Thereafter the decision of the said cause was delayed because the trial court felt disqualified to determine the issues for the reason that one of the plaintiffs was clerk of the District Court of the First Judicial District of the Territory of New Mexico, and much time was thereafter consumed between the parties in coming to an agreement for the submission of the issues for decision to another judge.

7. On the 3rd day of March, 1906, the said cause was submitted by agreement of the parties to the Honorable Edward A. Mann, Judge of the Sixth Judicial District for decision.

8. On August 30, 1906, the decision of Judge Mann in said cause was filed.

9. On August 30, 1906, an appeal to the Supreme Court of the Territory of New Mexico was allowed and bond in appeal filed.

10. About September 20, 1906, the preparation of bill of exceptions herein was begun and the same was signed, sealed and settled on the 21st. of November, 1906.

11. It was found by the parties that much documentary evidence has become lost so that the attorneys on each side were put to much trouble and expense of time in order to restore the record, and as the earliest possible day, towit on the 24th day of November, 1906, a precipe for transcript was filed in said cause, but the record was not prepared and certified by the Clerk of the District Court until the 24th day of November, 1906, whereupon it was immediately filed in the office of the clerk of this court.

12. And thereupon the appellants took up the matter of having

the said record printed, as required by the rules, and did not reach an agreement with publishers until the 18th day of December, 1906.

13. The publishers agreeing to proceed with the utmost speed possible to them in the printing and delivering of the said transcript notified the attorney for appellants, on the 8th day of December, 1906, shortly before the contract for such printing was let to them, that the said transcript could not be printed and issued in less than five weeks' time from the date of the delivery of the copy to them, and such copy was not delivered to them until the 18th day of December, 1906.

14. The printed record will contain in round numbers one hundred and twenty-seven thousand words.

15. The appellants desire for general convenience and clearness to prepare their assignment of errors and their brief with reference to the printed transcript.

66 16. This application is not made for purpose of delay, but to the end that justice may be subserved with incidental saving of time and the promotion of perspicuity.

(Signed) A. B. RENEHAN,
Attorney for Appellants.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

A. B. Renehan, being first duly sworn upon his oath says that he has read over and knows the contents of the foregoing motion and that the same are true of his own knowledge.

(Signed) A. B. RENEHAN.

Subscribed and sworn to before me this 27th day of December, 1906.

[SEAL.] (Signed) STELLA V. CAANY,
Notary Public.

Which said motion was and is endorsed on the back thereof as follows, to-wit: "Supreme Court, Territory of New Mexico, No. 1180. Eloisa L. de Bergere, et al., vs. Luciano Chaves, et al. Motion. Filed in my office this December 28th, 1906. Jose D. Sena, Clerk. A. B. Renehan, Santa Fe, N. M., Attorney for Appellants."

And Afterwards, on to-wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January, A. D., 1907, on the fifth day thereof, the same being Tuesday, the fifteenth day of January, A. D., 1907, the following among other proceedings were had and entered of record, to-wit:

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No. 1180.

ELOISA L. DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES et al., Appellants.

Appeal from District Court, Santa Fe County.

Now comes the appellants by A. B. Renehan, their attorney and move the court for sixty days further time within which to file the printed transcript, assignment of errors and briefs of counsel in said cause, and the court being sufficiently advised in the premises grants the said motion. It is therefore considered and adjudged by the Court that the appellants herein do have sixty days further time within which to file printed transcript, assignment of errors and briefs, herein.

It is further ordered by the court that the said cause be and the same hereby is set for hearing for the August session of this Court.

And Afterwards, on to wit, on the tenth day of April, A. D., 1907, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is in the following words and figures, to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D., 1907.

No. 1180.

ELOISA L. DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES, et al., Appellants.

Appeal from District Court, Santa Fe County.

Assignment of Errors.

Now comes the appellants by A. B. Renehan, their Attorney, and for assigning error on the part of the court below in said
68 cause, say:

1. The Court erred in excluding legal and competent evidence offered by the defendants to the exclusion of which they promptly excepted.

2. The court erred in admitting illegal and incompetent evidence offered by the plaintiffs in spite of the defendants' objection and exception.

3. The court erred in giving judgment for the plaintiff because the same is contrary to the law, contrary to the evidence and contrary to the law and the evidence.

4. The court erred in not giving judgment for the defendants because the law and the evidence entitled them thereto.

5. The court erred in awarding the defendants damages in the sum of $150.00, or any other sum, because the same is contrary to the law, contrary to the evidence, and contrary to the law and the evidence, and because there is no proper evidence to support such award.

6. The court erred in denying the defendants' motion for a new trial (p. 137 t. r.) which ruling the defendants promptly excepted.

7. The court erred in each and every of its findings of fact and conclusions of law incorporated in the judgment because the same and each of them are contrary to the law, the evidence, and the law and the evidence, and to each of which the defendants promptly objected, and excepted.

8. The court erred in its opinion because the same is contrary to the law and the facts, and particularly because it misapprehended the effect of the case of Joseph vs. Carter upon which it is in the last analysis based.

9. The court erred in denying the motion (p. 58) of the defendants for findings and conclusions.

10. The court erred in not finding the issues for the defendants and in particular should have made the following findings and conclusions as requested:

(a) That even though the said contract were executory at the time it was made, thereafter some action was taken between the parties thereto whereby all the right, title and interest of Manuel A. Otero, was vested by him to Jesus Ma. Sena y Baca.

(b) That Manuel A. Otero, acknowledged that his sale and transfer of the said ranch to Sena y Baca was absolute and without qualification at the year in which he died and thus declared against interest in the same.

(c) That no demand of possession of the said ranch was made of the defendants, or any of them, by the plaintiffs, or any of them, prior to the institution of this suit.

(d) That no tender to the defendants to Agapita Ortiz de Sena, the widow, heir, joint tenant or tenant in common of Jesus Ma. Sena y Baca in the Galisteo ranch or grant, under said contract, by the plaintiffs or any of them, was ever made or made previous to the beginning of this suit of the Bartolome Baca grant or any part or interest thereof, or of the possession of the plaintiff of parts thereof, as claimed for confirmation under the small holding acts.

(e) That if the said contract was executory the rejection of the Bartolome Baca grant in 1881 during the lifetime of Manuel A. Otero gave to him a right of reentry immediately upon such rejection, inasmuch as the time of the decision of the Surveyor General or his recommendation in the premises, was in contemplation of the contractors, and not the final action of Congress, and the statute of limitations then started to run against him and his privies, and in the time interposed a bar to the maintenance of this suit.

(f) The fact that the deed of Sena y Baca to the Bartolome Baca

grant to Manuel A. Otero is later in date than the contract between Sena y Baca and Manuel A. Otero for the Galisteo ranch or grant in the light of all the testimony, induces the court to believe and to say that subsequently to June 22, 1878, Manuel A. Otero absolutely divested himself of all right, title and interest in the Galisteo ranch or grant for and in consideration of the transfer to him by Sena y Baca of the latter's interest in the Bartolome Baca grant.

70 (*g*) That if Congressional action upon the title of the Bartolome Baca grant was contemplated by the contracting in the agreement of June 22, 1878, Congress has not lost jurisdiction in the premises, but may still pass thereon and this suit is premature.

(*h*) That the title and claim of Don Miguel E. Pino to the Galisteo ranch contained a reservation and exceptions of certain tracts within the out boundaries thereof, and the claim and title of Manuel A. Otero to the said ranch was and is at all times material hereto subject to the same reservations and exceptions under the said agreement of June 22, 1878, and otherwise, yet the plaintiffs have not excluded such reservations and exceptions from the land in suit, and have not shown that the Galisteo ranch or grant as finally confirmed is not identical with such reservations or exceptions or is not other land within the claimed boundaries of the Galisteo ranch or grant as presented for confirmation. In addition the defendants [illegible] detailing title exclusively through Miguel A. Otero, but outside other interests in the Galisteo grant which the plaintiffs have not shown are the same as the lands described in the complaint or declaration. Besides numerous tracts of land were within the claimed boundaries of the ranch or grant which the plaintiffs have not shown to be different from the lands in question.

(*i*) In this case, upon presumption, the Court finds, as a matter of polity as well as of convenience, and necessary for the peace and security of society, in view of the long possession and use of said ranch herein, that to Jesus M. Sena y Baca, his privies and assigns a valid grant and deed for said ranch was made conveying the same in fee simple to Jesus M. Sena y Baca or his grantees.

(*j*) The [illegible] and decrees in plaintiffs No. 24 and defendant's No. 5 are presumed to have been made prior to the execution.

(*k*) The plaintiffs are estopped by laches to recover.

(*l*) That Manuel A. Otero interpreted the said contract of June 22nd, 1878, as an absolute conveyance.

71 (*m*) That the Galisteo grant was perfected at the time of the treaty of Guadalupe Hidalgo.

(*n*) That the plaintiffs have not connected themselves by privity of contract with the original allottees of the Galisteo ranch or grant.

(*o*) That in any event the possession of Jesus M. Sena y Baca of said ranch was originally lawful, as well as that of his successors in interest therein, and no demand having been made upon the defendants to give up the possession, and no notice having been given to them to quit, this suit cannot be maintained.

(*p*) That the plaintiffs should take nothing by their action, but that the defendants should go hence without day.

11. The court erred in its first finding of fact because it is contrary to the evidence and because it appears from the evidence that the Galister Ranch included other titles, independent of Manuel A. Otero, particularly excepted from the title conveyed to him, and which is defined in the contract of June 22, 1878, as the ranch which was formerly of the deceased Don Miguel E. Pino from which certain tracts were excepted.

12. The Court erred in its second finding of fact because it is contrary to the evidence.

13. The court erred in its tenth finding of fact because it is contrary to the evidence, because the acts of Sena y Baca and his privies in respect to the Galister Ranch were not consistent with the ownership of the dominant title the title to Manuel A. Otero, on June 22, 1878, or at any time subsequent thereto, but at all times since said date was inconsistent with the idea of ownership of the dominant title thereto by the said Otero, and because the said finding is otherwise opposed to the evidence, as to the kind and character of improvements upon said land erected by said Sena y Baca and his privies, and the time thereof.

14. The Court erred in its sixth finding of fact because it is not supported by the evidence but is opposed thereby.

15. The court erred in its seventh finding of fact because it is immaterial, irrelevant and incompetent from and in view of the whole fact that before Congress took any action [illegible] to the end of the proceedings and because the contracting parties did not contract in respect to the title with reference to an action to be taken by Congress as a principal, but with reference to an adjudication and approval by the Surveyor General, an officer then in existence with authority to adjudicate and approve or recommend for confirmation land grants, whose powers in such respect were presumed to have been by the contracting parties, so that the time limited was the time of the recommendation of the Surveyor General of the said grant for confirmation or rejection by Congress.

16. The court erred in its tenth finding of fact because it is contrary to the evidence and without support therein, which shows that the said agreement of June 22nd, 1878, established a present sale and transfer of the Galister Ranch, under the limitations of the title and extent thereof by the reference to Don Miguel E. Pino's previous ownership thereof, with the exception of certain tracts therefrom, and was a sale and transfer of the same without formal deeds of conveyance to be given or executed unless the Bartolome Baca grant should be [illegible] and approved by the Surveyor General, as aforesaid, and by the use of the word "edelidos documentos" meaning deeds, something in the nature of a warranty deed was intended.

17. The court erred in its eleventh finding of fact because it is contrary to the evidence.

18. The court erred in its twelfth finding of fact because it is contrary to the evidence, and because the confirmation of the grant was made to the heirs, legal representatives and assigns of the original

[illegible] orders or allotments thereof, and [illegible] since the lands are excepted from the alleged Manuel A. Otero title, as shown in the proofs.

19. The court erred in its thirteenth finding of fact because it is contrary to the evidence, and is not supported thereby.

20. The court erred in its fourteenth finding of fact because it is contrary to the evidence and finds no support therein.

21. The court erred in its conclusion of law because it is contrary to the law, contrary to the evidence and contrary to the law and the evidence.

22. The court erred in its second conclusion of law, for the same contrary to the law, contrary to the evidence and contrary to the law and the evidence.

23. The court erred in its third conclusion of law because it is contrary to the law, contrary to the evidence and contrary to the law and the evidence.

24. The court erred in its fourth conclusion of law because it is contrary to the law, contrary to the evidence and contrary to the law and the evidence.

25. The court erred in its fifth conclusion of law because it is contrary to the law, contrary to the evidence and contrary to the law and the evidence.

26. The court erred in its sixth conclusion of law because it is contrary to the law, contrary to the evidence and contrary to the law and the evidence.

27. The court erred in its seventh conclusion of law because it is contrary to the law, contrary to the evidence, and contrary to the law and the evidence.

28. The Court erred in denying the motion of the defendants [illegible] to find conclusions of law in conformity with the findings of fact excepted to those made by the court.

30. The court erred in denying the motion of the defendants [illegible] findings of fact and conclusions of law.

31. The Court erred in sustaining the objection made by the defendants [illegible] offer to prove to show that plaintiffs' sale of a certain piece of certain small holding interests in the Bartolome Baylen [illegible]

32. The court erred in finding the issues in favor of plaintiffs.

33. The court erred in failing to find the issues in favor of the defendants.

34. The court erred in not sustaining the motion of the defendants, after the plaintiffs had rested their case in chief, for the court to find the issues in favor of the defendants.

35. The court erred in sustaining the objection of the plaintiffs on page 182 of the record to the request of the defendants to have Clemente Ortiz sworn in surrebuttal as to the matters covered by the deposition of George H. King, to which ruling the defendants then and there excepted.

36. The court erred in sustaining the objection of the plaintiffs on page 199 of the transcript of evidence to the question as to whether or not there were any conditions attached to defendants' exhibit No. 5 on the part of Agapita Ortiz.

37. The court erred in sustaining the objection of the Prose-

...vania Development Company and the plaintiffs' objection also, to ...
the question to the witness Hopewell, on pp. 238 and 239 of the ...
transcript of the evidence, as to the control of certain papers, over ...
the exception of the defendants.

38. The court erred in sustaining the objection of the plaintiffs ...
to the question as to whether or not the said papers could be pro... said otherwise than upon the consent of the witness Hopewell, or ...
of A. M. Bergere, a party to the escrow in question, over the ex... control of the defendants, because the said question was generally ... proper and particularly proper to learn in the beginning under ... the question the production of the said papers could be obtained ... otherwise to the theory and on the purpose of qualifying the ... attitude of the witness A. M. Bergere, in case he should refuse his ... the production of the said papers, as more particularly ... on the offer to prove in this connection, pp. 238 to 242 inc...

39. The court erred in sustaining, in spite of the exception of th... ...the plaintiffs' objection, as not the best evidence to the ... ...of the transcript concerning the purported ... ...represented a contract, etc., on the ground ... ...proper and the evidence should have been ... ...because the court prevented the produc... ...and then sustained this objection on the ... ...evidence, as more particularly ... ...to prove in this connection.

40. The court erred in ignoring the offer to prove and ... ...the proof of the facts mentioned, pp. 238 to 242 ...

41. The court erred in refusing to permit the attorney for the de... ...inspection of the instruments referred to on page ... ...the transcript of the evidence, and in sustaining the objec... ...of the Pennsylvania Development Com...

42. The court erred in inspecting the documents in question on ... pp. 241 and 242 of the transcript of the evidence without sight ... ...given thereof to the attorney for the defendants, and in de... ...the materiality of the said documents without ... ...inspection thereof by the attorney of the defendants ...

43. The court erred in its exclusion of the production of the said ... ...upon the examination of Rule 4 Paleo, pp. 242 and ...

44. The court erred in its exclusion of the evidence as to the ... ...and the production thereof on the examination of the ... ...M. Bergere at page 243 et seq. of the transcript of the ... ...of the defendants to prove the contents ... of the said escrow agreement.

45. The court erred in sustaining the objection marked 22 on ... page 248 of the transcript of the evidence.

46. The court erred in sustaining the objection marked 93 on ... page 248 of the evidence.

47. The court erred in sustaining the objection marked 24th on ... page 249 of the transcript of the evidence.

48. The court erred in sustaining the objection marked 25th on page 240 of the transcript of the evidence.

49. The court erred in sustaining the objection marked 25th on page 243 of the transcript of the evidence.

50. The court erred in determining from a private inspection of the memorandum on the back of the escrow agreement in question whether the contents were material or immaterial, competent or incompetent, without right of inspection by defendants' counsel, and thus excluding investigation thereof, by the defendants, as found on page 241 of the transcript of the evidence in the testimony of A. M. Bergere.

76 51. The Court erred in sustaining the objection marked 27 on pp. 244 and 245 of the transcript of the evidence of A. M. Bergere, as to how and from whom and in what manner the said witness derained title to the land embraced in the said escrow agreement.

52. The court erred in sustaining the objection of the plaintiffs to the defendants' offer to prove by the witness Bergere that whatever title he had for the lands embraced within the said escrow agreement he acquired by quit-claim conveyance by the plaintiffs in this cause, that the said lands are the same as those included in the small holding claims in evidence and are based upon the Bartolome Baca Grant rejected. p. 246

53. The Court erred in sustaining the objection of the plaintiffs to the question to the witness Bergere as to source of whatever title he had in the lands embraced in the said escrow agreement. p. 246

54. The Court erred in sustaining the objection of the plaintiffs to the question to the witness Bergere as to what he relied upon for the lands which are the subject of the escrow agreement. p. 246

55. The court erred in sustaining the objection of the plaintiffs to the question to the witness Bergere as to whether or not he based his claim to the lands being the subject of the said escrow agreement upon certain small holdings and certain deeds from persons claiming interests by reason of being tenants in common under the Bartolome Baca land grant rejected. p. 248

56. The Court erred in refusing to admit proof by the defendants through the witness Bergere of the same facts sought to be proved by the said witness Bergere the particular fact that he purchased from the plaintiffs in this case whatever interest they might have had in the small holdings in question, and he thereupon made a contract and sold the said lands to the said Hopewell, which said small holding rights, if any there were, arose from the possessory right of Jesus Ma. Sena y Baca to the Bartolome Baca grant, and that thereby it will appear that the plaintiffs seek to claim the ownership of said possessory rights under the Bartolome Baca grant that Jesus M. Sena y Baca had without tendering back the Jesus Maria Sena y Baca interests in the Bartolome Baca grant. p. 249

77 57. The court erred in sustaining the plaintiffs' objection to the question addressed to the witness, A. M. Bergere, as to whether or not he had sold whatever rights he had in the said

lands under said small holdings to W. S. Hopewell by means of said escrow agreement for the sum of $20,000 or thereabouts.—p. 250 hereof.

58. The court erred in ruling that the escrow transaction was entirely out of the case.

59. The court erred in sustaining the objection to the question addressed to the witness, A. M. Bergere, as to whether or not he had received of the purchase price of $20,000 or thereabouts the sum of $10,800.—p. 250 hereof.

60. The court erred in holding that a tenant in common whose rights cannot be affected in real estate by reason of nonage can by such disability prevent the statute from running as to cotenants not under disability.

61. The court erred in finding the issues and giving judgment in favor of the plaintiffs who were not minors and who were not presumed to have been under the disability of minority of age and in giving in their favor judgment for damages.

62. The court erred in admitting the evidence the deposition of George H. King, and especially in view of the fact that the evidence of J. Francisco Chaves on the same subject was of equal force with that of the said King, at least, if not better and greater force.

63. The court erred in overruling (p. 39) the defendants' objection marked No. 1, on p. 91.

64. The court erred in overruling at page 39 the defendants' objection marked No. 2 found at page 134.

65. The court erred in overruling at page 39 the defendants' objection marked No. 3 found at page 134.

65½. The court erred in overruling at page 40 the defendants' motion marked No. 3 at page 180.

66. The court erred in sustaining the objection of the plaintiffs, marked objection No. 5 at page 199.

67. The court erred in overruling at page 40 the defendants' objection marked No. 6 found at page 210.

68. The court erred in overruling the objection and denying the motion of defendants found at page 211, the ruling being found at page 40 being objection No. 7.

69. The court erred in overruling at page 40 the objection of the defendants marked No. 8 and found at page 211.

70. The court erred in denying the motion numbered 1 of the defendants, found at page 216, the ruling being found at page 40.

71. The court which decided this case was without jurisdiction, the consent of the parties to the contrary notwithstanding, for the reason that the evidence in said cause was taken before another court which afterwards disqualified itself on the same ground which must have existed at the time that the evidence was so taken and important and material rulings made, and at most the findings by the court which decided the issues upon the record the court was without jurisdiction and the findings and decisions were erroneous.

Wherefore, the defendants pray that the judgment of the court below be reversed and that the judgment be entered in this court in

favor of the defendants, or that such other order or judgment in the premises may be made as may be proper.

(Signed)

A. B. RENEHAN,
Attorney for Appellants.

Which said assignment of errors was and is endorsed on the back thereof as follows to wit: "No. 1180. Supreme Court Territory of New Mexico. Eloisa L. de Bergere, et al. Appellees, vs. Luciano Chaves, et al., appellants. Assignment of errors—Filed in my office this Apr. 10, 1907. Jose D. Sena, Clerk—A. B. Renehan, Santa Fe, N. M. Attorney for Appellants."

And Afterwards, on to wit, at the said regular term of the Supreme Court of the Territory of New Mexico, on the Fourteenth day, thereof, the same being Tuesday, the 27th day of August A. D., 1907, the following among other proceedings was
79 had and entered of record, to wit

No. 1180.

ELOISA LUNA DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES et al., Appellants.

Appeal from District Court, Santa Fe County.

Upon motion of the parties herein both appellants and appellees and pursuant to stipulation contained in the transcript in the cause, It is ordered that the clerk of the District Court of the County of Santa Fe, in the first Judicial District of the Territory of New Mexico, whence this cause comes into this court, do at once send up to this court the original plaintiffs' Exhibits No. 24, and the Original Defendants' Exhibits No. 5 for use upon the hearing in the cause.

And Afterwards, on to wit, at the said regular term of the Supreme Court of New Mexico, on the sixteenth day, thereof the same being Thursday August 29th A. D. 1907, the following among other proceedings were had and entered of record, to wit

No. 1180.

ELOISA LUNA DE BERGERE et al., Appellees
vs.
LUCIANO CHAVEZ et al., Appellants.

Appeal from District Court, Santa Fe County.

This cause coming on for hearing upon the transcript of record assignment of errors and briefs of counsel, is argued by A. B. Renehan Esq., for appellants and R. C. Gortner, Esq., for appellees and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first
80 Monday in January A. D. 1908, on the fifth day of the said regular term, the same being Tuesday, the 14th day of January, A. D. 1908, the following among other proceedings were had and entered of record to-wit:

No. 1180.

ELOISA LUNA DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES et al., Appellants.

Appeal from District Court, Santa Fe County.

This cause having been argued by counsel and submitted to and taken under advisement by the Court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Chief Justice Mills, Associate Justices Pope Parker and Abbott, concurring, affirming the judgment of the court below for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the District Court in and for the county of Santa Fe, whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith it is considered and adjudged by the court that the said appellees, Eloisa Luna de Bergere, Alfred M. Bergere, her husband, Edward, Adolfina and Manuel B. Otero, do have and recover of and from the said appellants Luciano Chaves, Apolonio Chaves, Gregorio Chaves, Asencion Chaves, Natonio Sandoval, Abagracia Chaves, Rosario Rodriguez de Chaves, the possession of the said premises, piece and parcel of land and real estate, situate, lying and being in the county of Santa Fe, aforesaid and known as and commonly called "The Galisteo Grant" the extent, location and boundaries of the same being as follows:

"Beginning at the northeast corner of the survey thereof by M. E. Easley, made under direction of the Surveyor General of the United States for the Territory of New Mexico, and remaining on file in the office of the said Surveyor General; thence north seventy-seven degrees fifteen minutes west, to the east side of the old reservoir site of the people of Galisteo; thence first in a southerly direction and afterwards in a northwesterly direction following the meanders of the edge of said reservoir site, in a manner as to exclude the same, to the northeast corner of an stone wall constituting the east and north boundary of the allotment made in said grant to one Matias Sandoval; thence, following said stone wall in a southerly and westerly direction until the same covers the east boundary of the homestead entry No. 3460, granted to Rafael Ortiz, on January 11th, 1897; thence south along said east boundary to the north bank of the Galisteo River; thence

in an easterly direction following the meanders of said river to its junction with the arroyo Atascoso, or Rio de San Cristobal; thence crossing the Galisteo River in an easterly direction to the east boundary of said survey by said Easley, thence in a right line to the point of beginning being the same premises indicated by letters A, B, C, D, E, F, G, H, I, J, K, L, and M on plat attached as Exhibit "A" to objections filed by the United States to the survey of the said Easley in case No. 54 in the Court of Private Land Claims of the United States, in and for the Territory of New Mexico, in a certain cause therein entitled Luciano Chaves, et al., vs. the United States of America.

And it is further considered, ordered and adjudged that the said appellees do have and recover of and from the appellants, their damages in the sum of four hundred and eighty-seven 87/100 dollars together with interest at the rate of six per cent per annum from the 20th day of August, A. D., 1906, until paid, and the costs of this action to be taxed, and that writs of possession and execution issue herein.

And Afterwards, on to wit, on the sixth day of the said regular term of the Supreme Court of the Territory of New Mexico, the same being Wednesday the 15th day of January, A. D., 1908, the following, among other proceedings were had and entered of record, to wit:

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No. 1180.

EUFRASIA LUCERO DE BUSQUET et al., Appellees
vs.
LUCIANO CHAVEZ et al., Appellants.

Appeal from District Court, Santa Fe County.

This cause coming on upon the motion of appellant for additional time within which to file motion for rehearing, and the court being sufficiently advised in the premises grants the said motion. It is therefore considered and adjudged by the Court that the appellants herein do have twenty days from this date within which to file motion for rehearing herein.

And Afterwards, on to wit: on the 3rd day of February A. D. 1908, there was filed in the office of the Clerk of the Supreme Court of New Mexico, a motion for rehearing, which said motion for rehearing was and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908.

No. 1180.

ELOISA LUNA DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVEZ et al., Appellants.

Appeal from District Court, Santa Fe County.

Now comes the appellants and move the court for a rehearing of said cause on the following grounds:

1. The court inadvertently determines that the Galisteo Ranch is a part of the Galisteo Grant, when the fact is that the two names have at all times been interchangeably used to designate the same place.

2. In consequence of this inadvertence, and otherwise, the court has failed to give due effect to and overlooked a question decisive of the case, to-wit: that fundamental deeds, under which all the parties to this action deraign title or pretended to deraign title to lands described in the complaint or declaration, expressly reserved from their operation certain several excepted tracts, which question is discussed at pp. 34, 35, 36, 37 and 38 of appellants' brief. Said question is called to the rule established by the Supreme Court of the United States, that "It is incumbent upon the plaintiffs to show that the land they sued to recover had not been previously conveyed and hence that they had taken title thereto under their deeds." (Maxwell Land Grant Company, vs. Dawson): "If the grantor passes should convey to another a block of land, excepting therefrom a lot previously conveyed, to sustain ejectment for a particular lot, it would be necessary for the plaintiff to show that the lot which had been previously conveyed." (Idem.) This question was raised by the defendant at the close of plaintiff's case in chief by motion to instruct for defendants for want of such proof, an omission which was nowhere supplied in the case. The record shows, (Ibid p. 33) that from the grant under which the plaintiffs claim they was excepted a tract of 200 varas, a tract of 100 varas, and a tract of twenty-five varas, as also two buildings on the land; it also shows that the grant as claimed and conveyed by all the conveyances material hereto contained 25000 acres or so, but that by the action of the court of private land claims 2319 acres were held to constitute the grant; it also shows that plaintiffs do not deraign title solely by the ancestors of the plaintiffs, but that they got in other titles, some of which may have been all that the record discloses, the said excepted tracts.

The court has likewise inadvertently overlooked a question decisive of the said case, to-wit: that the plaintiffs held to and sold without profit the land which they claimed was granted to their ancestor in exchange, conditionally they state, for the Galisteo grant or Ranch, and thus claim both the Galisteo grant or Ranch, and the

interest which they got therefor in the Bartolome Baca grant, which evidence was excluded by the court below and has not been taken into account by this court, although submitted.

84 4. The court overlooked the law that the plaintiffs could only recover, in any event, when they have shown identity of land, and superiority of right, which they did not do, a question duly submitted, and decisive of the case.

Counsel for appellants respectfully shows that by reason of unforseen circumstances, business of grave and great importance, both in courts of other districts, he was unable to be present at the time of the opinion herein was rendered, and since the rendition of the said opinion has only been at his office one day, for which reason he has been unable to give proper consideration to the opinion and the case, looking to a motion for a rehearing, but has been compelled to make such motion practically from memory, and without study, wherefore, he prays that he may have leave to amend the motion and that he may have a reasonable time in which to do so.

A. B. RENEHAN
Attorney for Appellants.

which said motion was and is endorsed on the back thereof as follows to wit: "No. 1180. In the Supreme Court of the Territory of New Mexico. January Term A. D. 1908. Eloisa L. de Borrego et al., Appellees, vs. Luciano Chavez et al., Appellants. Motion for Rehearing. Filed in my office this Feb. 3, 1908. Jesse D. Sec'k."

And afterwards, on to-wit, on the ninth day of the said January term, the same being Monday, the 24th day of February A. D. 1908, the following among other records, files were had and entered of record, to-wit:

No. 1180.

Eloisa Luna de Borrego et al., Appellees,
vs.
Luciano Chavez et al., Appellants.

Appeal from District Court, Santa Fe County.

85 It is ordered by the court that the appellant herein be and until Wednesday, February 26th A. D., 1908, within which time to file an amended motion for rehearing herein.

And afterwards, on to-wit, on the 26th day of February A. D. 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an amended motion for a rehearing, which said amended motion for a rehearing herein, was and is in the following words and figures, following, to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908.

No. 1180.

ELOISA LUNA DE BURGETT et al., Appellees,
vs.
LUCIANO CHAVEZ et al., Appellants.

Appeal from District Court, Santa Fe County.

Now comes the appellants and by leave of the court first had and obtained file herein their amended motion for a rehearing and state the following grounds of motion:

1. The court inadvertently determines that the Galisteo tract is part of the Galisteo grant, when the fact is that the Galisteo grant [illegible] and the same thing, except that the [illegible] by the Court of Private Land Claims [illegible] confirmed 24000 acres, while as confirmed it contained only 2219 acres, the complaint in this cause (R. p. 3) describes the premises sued for as being "known as and commonly called the Galisteo Grant" and the stipulation herein (R. p. 14) referring to the [illegible] Land Claims [illegible] W[illegible] the matter who decided the case finding the land in dispute to be known as the Galisteo Ranch," the title to which [illegible] certain lines in Manuel Antonio Otero holding is granted the [illegible] 1822 (R. p. 11), from which it follows that what was confirmed was only a small part of that which was claimed.

2. In consequence of the inadvertence mentioned in the first paragraph hereof, and for other reasons, it will appear [illegible] has failed to give effect to and has overlooked a question [illegible] of this cause, in this, that the fundamental [illegible] under which the plaintiffs pretend to derive title to the premises in question [illegible] from their exception certain several [illegible] (31, 32, 36, 37 & 38), wherein attention is called to the rule established by the Supreme Court of the United States that [illegible] is incumbent upon the plaintiffs to show that the land they [illegible] or had not been previously conveyed and hence that they [illegible] thereto under their deed. [illegible] "if for any reason or [illegible] person should convey to another a block of land, excepting from [illegible] previously conveyed, to sustain ejectment for any [illegible] lot, it would be necessary for the plaintiff to show that it [illegible] not the lot which had been previously conveyed" (Maxwell Land Grant Company v. Dawson, 151 U. S., L. ed. 287; v. Hawkins [illegible] 5 Pet. 457, and etc. etc.).

[illegible] joint motion to demurrer to the evidence at the close of [illegible] case in chief (R. p. 94).

[illegible] record shows (Brief p. 33; R. p. 330) [illegible] that from the front

under which the plaintiff's claim there was excepted a tract of 200 varas, a tract of 100 varas, and a tract of 25 varas, as also two buildings on the land.

The plaintiffs have not proved that the land which was confirmed was not merely the said excepted portions, nor are there any facts from which an inference may be drawn that the grant as confirmed was other than those excepted tracts. Within the rule cited from the Supreme Court of the United States it was their burden to do so.

Besides the record shows that the defendants got in the title to at least one of those excepted tracts (R. pp. 384, 388), apparently which was described as being "situated in the eastern edge of the Miguel E. Pino grant and tract of land," so that in part at least the defendants have proven an outstanding title, although
87 under the rule aforesaid the burden was not upon them to do so.

3. The court has likewise inadvertently overlooked a question decisive of the case, that is to say, that the plaintiffs held to and sold at great profit the land which they claim was granted to their ancestor in exchange, conditionally they say for the Galisteo grant or ranch, and thus claim both the Galisteo grant or ranch and the interest in the Bartolome Baca grant which they got therefor. This is shown only by questions and offers to prove, but proof of which was not permitted by the court. (Brief p. 52; R. pp. 237, 242 and 243) and in this connection the court seems to have noticed the following rule:

"Where parties exchange land and enter into possession under a contract to deed to each other at a particular day, neither can maintain ejectments against the other without notice and without an offer to rescind the contract." (Maynard v. Cable, Wright, (Ohio) 18; R. p. 49.)

4. The court overlooked the point that adverse possession under an executory contract of purchase began when the vendee failed to comply with the terms of sale (Gregg v. Von Phul, 1 Wall. 281; Brief pp. 48, 52), and in this case the terms of sale, if the contract in question was executory, were that the Bartolome Baca grant should be approved and adjudicated by the surveyor general (Brief pp. 50 & 51), at which time the plaintiffs' ancestor, had right of action if at any time (Gregg vs. Von Phul, 1 Wall. 284) as the quasi tenancy, if it were a tenancy at all was fixed term, that is, until the surveyor general should have decided the status of the Bartolome Baca grant. (Gregg, v. Von Phul, 1 Wall. 284, Hotaling vs. Hotaling, 17 Barb, 167).

5. The court overlooked the rule fixed in Naher v. Armijo, 9 N. M. 340, that adverse possession may operate against cotenants not under disability, and therefore a fortiori it should in this case in any event have operated against the interests at least of the three children and heirs of Manuel Antonio Otero.

6. The court overlooked the force and effect of Fletcher v. Fuller 120 U. S., 545, (Brief p. 46) and particularly that part thereof as follows:

88 "It may be, in point of fact that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance.

announcing the doctrine of presumption of grants, which is not the same as adverse possession and would relieve this case of any question involving the favoritism which the law shows to infants.

7. The court overlooked the force and effect of Willison vs. Watkins, 3 Pet. 312, and that part thereof which reads: "Having thus a right to consider the lessee as a wrong doer, holding adversely, we think that under the circumstances of this case the lessor was bound to do so. If no length of time would protect a possession originally acquired under a lease it would be productive of evils truly alarming." (Brief p. 44.)

8. The court has overlooked the fact that the plaintiffs claimed full title to the Bartolome Baca grant at all times, notwithstanding their evidence that the trade of the Galisteo for the Bartolome Baca grant was upon condition.

9. The court overlooked the evidence of J. Francisco Chaves which is practically undisputed and conclusive from all points of view and especially from the point of view of long elapsed time, to the effect that Manuel Antonio Otero, admitted, against interest, that he had sold and conveyed the Galisteo grant or ranch (R. 152).

10. The court in sustaining the judgment for damages overlooked the fact that under our statute (C. L. 1897, sec. 3170) the plaintiff if he prevail shall recover damages to the time of the verdict, for the whole period that the defendant had knowledge of the plaintiffs' claim or title, but if he had no such knowledge then from the commencement of the action. Unless the defendants were not adverse holders from the time, September 7, 1881, when the surveyor general rendered his decision, then they would not become adverse holders without notice, and notice was not given, according to the rule in Gregg v. Von Phul, supra.

"Notice to quit is generally necessary where the relation of landlord and tenant exists and no definite period is fixed for the 89 determination of the estate, but where a lease is to expire at a certain time, a notice, to quit is not necessary in order to recover in ejectment, because to hold over would be wrong after the duration of the estate was fixed and well known to lessor and lessee. In an executory contract of purchase the possession is originally rightful, and it may be that until the party in possession is called, upon to restore it, he cannot be ejected without demand or notice to quit."

Under the contract, which has been held to be a contract of purchase, the provision is that the defendant predecessor "will take possession of the aforesaid ranch and will have and enjoy all the products of the same until the proper documents may be executed and in conformity with the above stated," which refers necessarily to the surveyor general's said decision.

11. There has just come to counsel's notice the case of Yaw v. Roberts 9 Kansas, App. 138, holding that when a vendor of land

seeks rescision of his contract of sale, he must refund the purchase money received by him thereunder, and under the theory and evidence in this case the purchase price of the Galisteo Grant was an undivided interest in the Bartolome Baca Grant, the possession of parts of which was a valuable asset to the plaintiffs by reason of the small holding law.

12. The court overlooked the doctrine of presumption of deed made, arising under a contract of sale. (Woodson v. Scott, 1 Dana, 172, Downing v. Ford, 9 Dana, 373; Brock v. Savage, 16 Pa. St. 83, Fletcher v. Fuller, 120 U. S. 545; Brief pp. 16 17 & 18.

13. The court assuming the plaintiffs' position as to the nature of the said contract to be in its initiation right, seems to have overlooked the defendants' defenses and the doctrine of estoppel evokable in ejectment (Brief p. 32.)

All of the Foregoing are questions decisive of the said cause and duly submitted by counsel, and the decision of the court is in conflict with the controlling decisions and statutory provisions.

Respectfully submitted.

(Signed) N. B. RENEHAN.
Attorney for Appellants.

90 which said amended motion for rehearing was and is endorsed on the back thereof as follows, to wit: "No. 1180. In the Supreme Court of the Territory of New Mexico. Eloisa Luna de Bergere, et al., vs. Luciano Chaves et al., Motion for rehearing. Filed in my office this Feb. 26, 1908, Jose D. Sena, Clerk."

And Afterwards, on to wit, *on* the fourteenth day of the said regular term, the same being Wednesday September 2nd 1908 the following among other proceedings were had and entered of record following to wit:

No. 1180.

ELOISA LUNA DE BERGERE et al., Appellee,
vs.
LUCIANO CHAVES, Appellants.

Appeal from District Court, Santa Fe County.

This cause coming on before the court upon the motion of appellants herein for a rehearing and the court having had the said motion under advisement and being now sufficiently advised in the premises, denies the said motion: It is therefore considered and adjudged by the court that the motion of appellants herein for a rehearing be and the same hereby is denied.

And Afterwards, on to wit, *on* the 4th day of September A. D. 1908, there was filed in the office of the clerk of the supreme Court of the Territory of New Mexico a motion for findings of fact, which said motion for findings of fact was and is in the following words and figures following to wit:

In the Supreme Court of the Territory of New Mexico.

No. 1180.

ELOISA LUNA DE BERGERE et al.
vs.
LUCIANO CHAVES et al.

91 Now come the appellants, by A. B. Renehan, their attorneys, and show to the court that judgment herein, in this court was entered pending the determination of the motion for a new trial, whereas it should not have been entered until that motion was decided; wherefore, the appellants pray that said judgment may be set aside.

Further, the appellants hereby give notice of an appeal to the Supreme Court of the United States, from the judgment of this court in said cause; and thereupon they pray the court to make findings of fact, and to set out and certify the exceptions of the defendants in the court below for review by the Supreme Court of the United States, with leave to the appellants to offer findings of fact for consideration.

A. B. RENEHAN,
Attorney for Appellants.

which said motion for findings of fact was and is endorsed on the back thereof, as follows, towit: "No. 1180.—Eloisa Luna de Bergere et al. vs. Luciano Chaves, et al. Motion for findings of fact.—Filed in my office this 4th day of Sept. 1908. Jose D. Sena, Clerk.

And Afterwards, on to wit, at a regular term of the Supreme Court of the Territory of New Mexico begun and held at Santa Fe the seat of Government, on the first Wednesday after the first Monday in January 1910, on the second day of the said regular term the same being Thursday, the 6th day of January, A. D. 1910, the following among other proceedings were had and entered of record, as follows to wit:

No. 1180.

ELOISA LUNA DE BERGERE, Appellees.
vs.
LUCIANO CHAVES et al., Appellants.

Appeal from District Court, Santa Fe County.

92 This cause coming on before the court upon the motion of appellants herein for an appeal from the judgment and decree of this court, to the Supreme Court of the United States, and to have the amount of the supersedeas Bond fixed, and the court being sufficiently advised in the premises, grants the said appeal, and fixes the amount of the Supersedeas Bond at the sum

of $5000.00; It is therefore considered and adjudged by the court that the motion of appellant herein for an appeal to the Supreme Court of the United States from the judgment and decree of this Court, be and the same hereby is granted and the supersedeas Bond is hereby fixed in the sum of Five Thousand dollars, with good and sufficient sureties to be approved by the Clerk of this Court.

And Afterwards, on to wit, on the 4th day of the said regular term of the Supreme Court of the Territory of New Mexico aforesaid, the same being Wednesday, the 2nd day of March, A. D. 1910, the following among other proceedings were had and entered of record to wit:

No. 1180.

ELOISA LUNA DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES et al., Appellants.

Appeal from District Court, Santa Fe County.

This cause having come on to be heard upon the motion of appellants to find the facts and to certify rulings by the court, and the appellants appearing by A. B. Renehan, their attorney, and the appellees appearing by C. C. Catron, their attorney, and it further appearing impracticable to make up the record in such respect and for good cause shown and by consent of the parties, it is ordered that the time for docketing the said cause and filing the record thereof with the Clerk of the Supreme Court be, and the same is hereby, enlarged thirty (30) days from this date, within which the citation to the appellees herein was signed by the undersigned.

WM. H. POPE
Chief Justice of the Supreme Court of New Mexico.

93 And Afterwards, on to wit, on the 21st day of February there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico a supersedeas Bond on appeal in the above entitled cause which said supersedeas Bond was and is in the following words and figures towit:

Know all men by these presents: That We Apolonio Chavez as principal, and Gregorio Chaves, Asencion Chaves and Manuel Sandoval, as his sureties, are held and firmly bound, in the penal sum of five thousand dollars, lawful money of the United States, the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, unto Eloisa Luna de Bergere, Adelina Otero, Edward Otero, Manuel B. Otero and Alfred M. Bergere, their heirs executors administrators and assigns.

But this obligation is upon condition: Whereas, in the District

Court of the First Judicial District of the Territory of New Mexico for the County of Santa Fe, the said Eloisa Luna de Bergere, Alfred M. Bergere, Adelina Otero, Edward Otero and Manuel B. Otero, brought suit in ejectment against Apolonio Chavez, Gregorio Chaves, Luciano Chaves, Ascencion Chaves, Antonio Sandoval, Altagracia Chaves, and Rosaria Rodriguez de Chavez, in which judgment was given in favor of the defendants, and, whereas, the said cause was appealed to the Supreme Court of the Territory of New Mexico, and the judgment of the lower court was affirmed therein, and, whereas, the defendants have appealed the said cause to the Supreme Court of the United States, bond on appeal and in supersedeas, having been fixed by the Supreme Court of the Territory of New Mexico, in the penalty thereof;

Now, therefore, if the said principal shall pay or cause to be paid the judgment in damages heretofore in said cause awarded against the defendants in said action, and all damages which shall lawfully accrue on account of said judgment, with interest and costs of suit in the lower court and in the appellate courts, and shall abide, stand to and perform the lawful judgments of the court in the premises, then this obligation shall be null and void, but otherwise it shall be and remain in full force and effect.

94

APOLONIO CHAVEZ, *Principal.*
his
GREGORIO x CHAVEZ. [SEAL.]
mark
his
ASCENCION x CHAVEZ. [SEAL.]
mark
ANTONIO SANDOVAL. [SEAL.]
JOSEFITA MONTOLLYA DE CHAVES. [SEAL.]

TERRITORY OF NEW MEXICO
County of Santa Fe, ss:

On this 24 day of February, 1910, before me personally appeared Apolonio Chaves, Gregorio Chaves, Ascension Chaves and Antonio Sandoval, to me well known to be the same persons described in and who executed the foregoing obligation and acknowledge to me that they executed the same as their free act and deed, and the said sureties being by me first duly sworn, each for himself and not one for the other did say that he is worth the sum of five thousand dollars, in lawful money of the United States, and in real and personal property situate and located in the Territory of New Mexico, over and above his just debts and liabilities and the amount exempt by law from execution.

In witness whereof, I have hereunto set my hand and notarial seal, the day and year in this certificate written.

(Signed)
[SEAL.] JOSE ORTIZ Y PINO,
Notary Public.

My commission expires the 20th day of April, 1911.

Approved by me this 21 day of February, 1910.

(Signed) JOSE D. SENA.
[SEAL.] *Clerk Supreme Court of the Territory of New Mexico.*

which said supersedeas Bond was and is endorsed on the back thereof as follows towit: "No. 1180. In the Supreme Court of the Territory of New Mexico. January Term, A. D. 1910. Eloisa Luna de Bergere, Appellee, vs. Luciano Chavez et al., Appellants. Bond of Supersedeas. Filed in my office this Feb. 21, 1910. Jose D. Sena, Clerk.

95 And Afterwards, on to wit, on the 21st day of February A. D., 1910, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an affidavit of value which said affidavit of Value was and is in the following words and figures *following* towit

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

Apolonio Chaves being first duly sworn upon his oath says that he is well acquainted with the tract of land which is the subject of the action in ejectment brought by Eloisa Luna de Bergere et al. against him, Luciano Chavez et al., No. 1180 in the Supreme Court of the Territory of New Mexico, and now pending appeal to the Supreme Court of the United States; that the said tract of land, commonly known as the Golston Ranch, and sometimes commonly called the Golston Grant, at all times material to this action was worth in the market more than five thousand dollars; that the actual value of the said tract of land in suit at the time of the institution in the District Court for the County of Santa Fe of the said suit was about six thousand dollars and that the value thereof at the present time is not less than seven thousand dollars, and this latter value was the actual value at the time of the appeal of the said Cause to the Supreme Court of the United States.

(Signed) APOLONIO CHAVES.

Subscribed and sworn to before me this 21st day of February A. D., 1910.

[SEAL.] (Signed) JOSE ORTIZ Y PINO

My commission expires the 20th day of April, 1911

which said affidavit of value was and is in the following words endorsed on the back thereof towit: "No. 1180. In the Supreme Court January Term, 1910. Eloisa Luna de Bergere et al. Appellees, vs. Luciano Chaves et al., Appellants. Affidavit of Value. Filed in my office this Feb. 21, 1910. Jose D. Sena, Clerk.

96 And Afterwards, on to wit, on the 31st day of March, A. D., 1910, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a statement of facts in the court in the above entitled cause, which said statement of facts was and is in the following words and figures to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1910.

No. 1180

ELOISA L. DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES et al., Appellants.

Appeal from District Court, Santa Fe County.

This cause having come on to be heard upon the motion of the defendants by A. B. Renehan, their attorney, to find the facts upon appeal to the Supreme Court of the United States, and the court being sufficiently advised in the premises, finds:

1. That the title to the land in controversy, known as the "Galisteo Ranch" and hereinafter more particularly described, up to June 22nd, 1878, was in Manuel Antonio Otero, he holding a part of the same as an unconfirmed title from the Mexican government, by virtue of purchase and acquisition from the heirs or grantees of the original grant.

2. That up to this point there is no dispute as to the title, all the parties hereto tracing their claim of title to this common source, viz., the title of Manuel A. Otero.

3. That on June 22nd, 1878, Manuel A. Otero and one Jesus María Sena y Baca entered into a written contract in words and figures as follows:

"Know all men by these presents: That, I, the undersigned Manuel Antonio Otero, resident of the County of Valencia in the Territory of New Mexico, for consideration have sold and transferred in favor of Jesus M. Sena y Baca and Agapita Ortiz, his wife, a ranch known as the Ranch of Galisteo, which is situated in the County of Santa Fe, and Territory aforesaid, known as a ranch which was formerly of the deceased Don Miguel E. Pino; which I will give and execute the documents of conveyance of said in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon there shall be adjudicated and approved by the Surveyor General Grant of Bartolome Baca of a tract which was ceded him by the vernor M. Felgarez, in the year 1819, and the which is situate in County of Valencia and Territory of New Mexico, aforesaid, and thereafter they will take possession of the aforesaid ranch and will e and enjoy all the products of the same until meanwhile the per documents may be executed, and in conformity with the as stated; and the said Jesus M. Sena y Baca so agrees and has ed here jointly with me.

In witness whereof, we sign the present, in La Constancia, County of Valencia, this 22nd day of June, A. D. 1878.

MANUEL A. OTERO
JESUS M. SENA Y BACA.

4. That under this contract Sena y Baca went into possession of the land in controversy, and remained in such possession until his death in 1885, when his rights descended to his widow and heir at law, Agapita Ortiz de Sena, who continued in possession until July 10th, 1888, when she deeded by quit claim all her rights to one Jesse D. Rumberg, at the same time delivering to him the original contract between Otero and her husband, both of which instruments Rumberg had placed of record. That Rumberg continued in possession until July 18th, 1889, when he quitclaimed his rights to Jose de la Cruz Chavez, at the same time delivering to Chavez the original contract between Otero and Sena y Baca.

5. That the present defendants are the heirs at law of Chavez and that the possession of his heirs, the said defendants, has been continuous from the time of his entry into the same until the commencement of this suit. That during all this time the possession of Sena y Baca and his privies has been continuous, they have farmed the land, made some improvements in the way of ditches and fences, paid some taxes and received the rents and profits, and have exercised all the possessory rights consistent with claim of ownership, but all consistent with the right to possess and enjoy the property conferred by the said agreement of 1878. That the improvements placed upon the said property were incidental solely to the agricultural use of said property, and consisted of fences and ditches solely, and that in fact, no improvements were placed upon said property in the way of fencing by defendants or their predecessors until during the occupation by Rumberg in 1888, and thereafter.

6. That the said premises were solely farming and grazing land and at the time of the transaction between Manuel Antonio Otero and Jesus Maria Sena y Baca were under fence, wall and natural barriers serving as a fence.

7. That there were no acts of hostile or adverse possession by Sena y Baca nor by Agapita Ortiz de Sena, from the date of the said agreement in 1878, except that they returned the same for taxes and paid some taxes due thereon during the several years since the date of the said agreement farmed the same, leased the same, and sold the produce, and sold and conveyed the same, although by quitclaim deeds, and the said Jesse D. Rumberg, and Jose de La Cruz Chavez and the present defendants, at all times occupied the property as herein otherwise stated in these findings of fact;

8. That Manuel Antonio Otero attempted to get the "adjudication and approval" of the said Baca grant by the Surveyor General but that he was never able to get a report made by that official even able to said grant; but that on the contrary the Surveyor General September 7, 1881, made a report to the Commissioner of the General Land Office recommending that that grant be rejected upon the

proofs which had been submitted to him at that time; but that before Congress took any action upon this recommendation of the Surveyor General the Court of Private Land Claims was created and empowered by Congress to adjudicate the Spanish and Mexican land grants in this Territory, including the Baca Grant, and thereupon the descendants of Manuel Antonio Otero presented their claim to the Baca grant in that court, and the same was at one time, in 1893, by that court confirmed; but this confirmation was set aside, however, by the Supreme Court of the United States, and the Bartolome Baca Grant finally rejected in 1897 by that tribunal.

9. That about the same time Sena y Baca, or his successors, presented in the Court of Private Land Claims the confirmation of the original Galisteo grant or ranch and finally succeeded in getting that portion known as the "Galisteo Ranch," the property in controversy, confirmed, the same being only a small portion of the Galisteo Grant, as claimed for confirmation in said Grant of Private Land Claims.

10. That under and by virtue of the Act of Congress of 1891 creating the Court of Private Land Claims the plaintiffs, Eloisa Luna de Bergere, Alfred M. Bergere, Adelina Otero, Edward Otero and other descendants and privies of Manuel Antonio Otero filed in the office of the Surveyor General of New Mexico applications for the confirmation to them of small holding claims within the claimed boundaries of the Bartolome Baca grant, rejected, after the rejection thereof by the Supreme Court of the United States, which, at the time of the institution and determination of this action, were pending for decision in the proper bureau of the land department of the government; that no time since September 7, 1881, when the Bartolome Baca grant was disapproved by the Surveyor General of New Mexico, has there been any tender or offer by Manuel Antonio Otero or any agent of his to return to the defendants, or to Jesus Maria Sena y Baca, or to Agapita Ortiz de Sena the interest in the said Bartolome Baca grant conveyed by Jesus Maria Sena y Baca and his wife to Manuel Antonio Otero as part of the said transaction and connected with the agreement of 1878.

11. That after the final rejection of the Baca grant and the final adjudication thereof, as aforesaid, plaintiffs, who are heirs of Manuel Antonio Otero, a son of Manuel Antonio Otero, brought this action to obtain possession of the Galisteo Ranch and grant.

12. That the agreement of 1878, above mentioned, was an executory contract for the deeding of the Galisteo Ranch to Sena y Baca, upon the happening only of a certain contingency, which contingency has been extinguished.

13. That from the date of the disapproval by the Surveyor General of the Bartolome Baca Grant, on September 7, 1881, Jesus Maria Sena y Baca, his widow, Agapita Ortiz de Sena, and her grantees remained in undisputed and undisturbed possession of the said premises, using (and openly claiming the same as their sole property), and returning the same for taxes and paying some but not all taxes thereon, without demand thereof or return thereof

being claimed by Manuel Antonio Otero, or any blood or contract privy of his, or any other person, until the institution of this action but this action was begun without previous demand or notice to quit, by the plaintiff or by any of them, or by any one for them for the possession of said premises or any part of it.

11. That the defendants herein seeking and obtaining the confirmation of the Galisteo ranch, by the Court of Private Land Claims, deraigned their alleged title in a chain necessarily passing through Manuel Antonio Otero, thus recognizing the common source of title.

15. That the title and claim of Miguel E. Pino, from whom Manuel Antonio Otero deraigned title, to the Galisteo grant or ranch contained reservations and exceptions of several tracts within the out-boundaries of said grant or ranch as claimed to contain 24,000 acres, which had previously been conveyed away by Miguel E. Pino and Manuel Antonio Otero took title to the said grant or ranch, subject to the said reserved and excepted tracts, the deed of the said Miguel E. Pino to the ancestors of Manuel Antonio Otero, describing the Galisteo grant being in words and figures as follows, to wit:—

"Know all men by these presents, that we Miguel Estanislao Pino and my wife, Luz Ortiz, for and in consideration of the sum of ($5000.00) five thousand dollars to be delivered to us by Jose Chaves y Castillo, is by this recognized to have given and bargained, sold and transferred, and by these presents we give, sell, bargain and transfer to the said Jose Chavez y Castillo all that rural property and real estate which we have existing in the settlement of
101 Galisteo, County of Santa Fe, Territory of New Mexico, which comprehends the titles which originals we transfer to him, and that they recognize the following boundaries: On the east the property of Bartolome Lovato; on the west the limit of the possession which is a stone wall nearly destroyed, on the south la arroyo and on the north the ridge of the hills; it being understood that in the body of said land, there are excepted two hundred varas which belong to Curate Juan Felipe Ortiz, one hundred which belong to Jose Francisco Baca y Terras and Juan Montoya, twenty-five varas which belong to Francisco Sandoval; and also, the walls of two houses which also belong to it, which are erected within the said land; it being understood that also we deliver him an agreement which as a transaction we had with Luis Griego in reference to the use of the tank which is constructed in a separate place for the irrigation of the cultivable land, in order that its conditions may be respected. The aforesaid properties of land, with its appurtenances and privileges to it belonging, as is above described in this document, we transfer to the said Jose Chaves y Castillo, his heirs, administrators and executors, in order that they may enjoy it as their own and as may seem best to them, and we protest that we have [illegible] enjoyed and possessed the said lands and house without interruption and in the same manner as stated and described, we transfer the same to the said Jose Chaves y Castillo, his heirs and assigns, stipulating that we will sustain and defend the title to the premises

in the said Jose Chaves y Castillo against all claims and lawful demands which by any person or persons may intervene.

In testimony whereof, we have placed our hands and seals in Santa Fe, this 23rd day of December, in the year of our Lord 1856.

MIGUEL E. PINO.
LUZ ORTIZ.

Acknowledged January 22nd, 1857, recorded January 26, 1867, Book "K", page 223, records of Santa Fe County."

16. That the plaintiffs have not excluded said reservations and exceptions from the land demanded in suit and have not shown that the Galisteo grant or ranch as finally confirmed is not identical with such reservations and exceptions, or within them.

192 19. That Manuel Antonio Otero died in the month of February, 1882, leaving him surviving Amelia Otero, Beatriz Otero and Manuel B. Otero, all of whom at the time of the institution of this action were living except Manuel B. Otero, who died August 17th, 1883. Manuel B. Otero, was survived by his widow, Eloisa Luna de Bergere and his children, Edward, born September, 1880, Adelina, born October 1881, and Manuel B. born September 1882. Amelia Otero was married some time in the year 1881, but there is no proof as to when Beatriz Otero was married. All of the said persons are descendants of Manuel Antonio Otero and claim their interest by descent or inheritance the real estate in question.

20. That the transaction between Manuel Antonio Otero and Jesus Maria Sena y Baca in 1878 simply amounted to an intended trade or exchange of those tracts of land, namely the Galisteo grant or ranch for the undivided interest of Sena y Baca in the Baca grant, the exchange of possession passing with the contract, and the conveyance to be made and the deal finally consummated according to the agreement in 1878.

21. That the damages of plaintiffs herein by reason of the withholding of the said property from the plaintiffs by defendants since September 30, 1907, the date of the judgment of the District Court, was the sum of four hundred and fifty dollars ($450.00) which amount is hereby found and assessed to be the said damages of the plaintiffs herein.

22. That the Galisteo ranch and grant are interchangeable names and was presented for confirmation to the Court of Private Land Claims as containing 24,000 acres and confirmed for 317 acres.

23. That Jesus Maria Sena y Baca, at the time of the making of the agreement of 1878 was the owner of a valuable undivided interest in the Bartolome Baca grant, so-called and as a part of the said transaction conveyed such interest to Manuel Antonio Otero by special warranty deed, the material part of which is as follows, viz:—

"This indenture made the seventeenth day of July, in the year one thousand eight Hundred and seventy-eight between Jesus Ma-

Sena y Baca a grandson and heir of Bartolome Baca, de-
1063 ceased, and Agapita Ortiz, wife of said Jesus Ma. Sena y
Baca, parties of the first part, and residents of the county of
Santa Fe, Territory of New Mexico, and Manuel A. Otero a resident
of the County of Valencia, Territory of New Mexico, of the second
part, Witnesseth, that the said parties of the first part for and in
consideration of one thousand dollars, lawful money of the United
States, to them in hand paid by the said party of the second part,
the receipt whereof is hereby acknowledged, have granted, bar-
gained, sold, aliened, remised, released, conveyed and confirmed,
and by these presents do grant, bargain, sell, alien, remise, release,
convey and confirm unto the said party of the second part, and to
his heirs and assigns forever, All that certain interest, right, title
claim and demand either in law or in equity, which the said Jesus M.
Sena y Baca or the said parties of the first part or either of them
have or may have had or hold or possess by virtue of inher-
itance from one Manuela Antonia Baca, the mother of Jesus M. Sena
y Baca and daughter of said Bartolome Baca, deceased, or by inher-
itance from said Bartolome Baca deceased, or in any other manner of
in and to that certain grant tract and parcel of land, lying and be-
situated partly in the county of Valencia and partly in the county
of Bernalillo in the Territory of New Mexico, and bounded and de-
scribed as follows, to-wit: On the North by the Ojo del Cibolo (Buf-
falo Spring) on the east by the Cerro del Perdenal (Flint Moun-
tain) on the south by the Ojo del Cuerbo (Crow Spring) from
there to the Ojo del Chico (Chico Spring) and on the west the ter-
ritory now known by the name of the Manzano Mountain, or
otherwise that of Alo, being the same property and land granted by
Governor Melgare, in the year eighteen hundred and nineteen, to
the said Bartolome Baca, now deceased, for a more particular de-
scription reference being here made to the said Grant papers. To-
gether with all and singular the tenements and appurtenances
thereunto belonging or in any wise appertaining, and the reversion
and reversions, remainder and remainders, rents, issues and profits
thereof, and also the estate, right, title, interest, property, possession,
claim and demand whatsoever, as well in law as in equity,
1064 of the said parties of the first part of, in and to the same and
every part and parcel thereof, with the appurtenances, to
have and to hold the above granted bargained and described prem-
ises with the appurtenances unto the said party of the second part,
his heirs and assigns, to and for their own proper use, benefit and
behoof forever."

"And That the following stipulation, on the trial was made by the
parties, to-wit:—

"It is stipulated between the parties that the defendants may offer
an abstract from the records of the Collector of Santa Fe County
showing the payment of taxes on the Galisteo ranch as far back as
the books of the Collector's office show until the present time. First
by Agapita Ortiz de Sena, and second by J. D. Romero, and third
by the defendants, and the additional fact that the books show that
no taxes have been paid by Manuel Antonio Otero or any of his su-

essors in blood at any time; only for the purpose of showing such
facts as the books thus contain, subject to valid objection on the part
of the plaintiffs on all grounds except as to being secondary evi-
dence."

and that the tax rolls of said County go back as far as the year
885, from which time Agapita Ortiz de Sena and her grantees con-
tinuously returned some land for taxes but did not pay all such
axes and thereupon the further stipulation was recorded, to-wit:—
"It is admitted and agreed by the parties hereto that the defend-
nts exhibit 14 contains a true and correct transcript of the tax
lls of the County of Santa Fe from 1885, to 1901; that the office
the Collector of Taxes of said county contains no records of tax
sts for the years prior to 1885; and that the land as described upon
said abstract under the names of Galisteo ranch, ranch of Jesus
ria Senas Baca, land of J. M. S. Y B. and other similar designa-
ns is a part of the tract in issue; that it is neither admitted nor
nied that the land referred to in the remainder of the said list as
ssold is the land in question.

5. That the Estancia ranch or Estancia Springs Ranch is about
the center of the Bartolome Baca grant as claimed for con-
firmation; that Nina Otero is identical with Adelina Otero;
and that the small holdings claimed by the several plaintiffs,
within the Bartolome Baca grant and are as follows:

Application No. 3212.

OFFICE OF THE UNITED STATES SURVEYOR GENERAL,
SANTA FE, N. M., *September* 6, 1898.

accordance with the provisions of section 18 of an act entitled
Act to Establish Court of Private Land Claims and to provide
settlement of private land claims in certain states and Terri-
approved March 3rd, 1891, and amended February 21st,
and done 27th, 1898, I Eloisa Luna de Bergere, of the County
encia Territory of New Mexico, hereby file my claim to a
land, not exceeding 160 acres which I through myself and
s or grantors, have been in actual, continuous adverse pos-
for the last 21 years. Said claim is not within any grant
been confirmed by or under the authority of Congress. It
ed in the County of Valencia, Territory of New Mexico, in
ip No. 5 North and Range No. 8 East of the New Mexico
l Meridian, and described as follows: (Here describe each
land claimed separately and accurately.)
ning at the Northwest Corner which is a post firmly set in
nd with a mound of earth around it, thence south 89 de-
minutes East, 5280 feet to northeast corner a post firmly
ground with a mound of earth around it, thence south No
20 minutes West 1320 feet to southeast corner, a post
in the ground with a mound of earth around it. Thence
Degrees 40 minutes West, 5280 feet to southwest corner,
mly set in the ground with a mound of earth round it.

Thence North No degrees 20 minutes East 1320 feet to northwest corner place of beginning.

This trace is what is known as Cienega del Tul Ranch, containing about 160 acres, and is supposed to be situate in T. 5 N., R. 8 E. N. M. P. M. (Un-surveyed) Valencia County, N. M. There are no adjoining claims.

ELOISA LUNA DE BERGERE, *Applicant*

103 Signature of Applicant, Christian name in full.

Santa Fe, N. M. Post Office Address.

Note.—Applicant's signature must be made before two witnesses.

Signed before us as witnesses:
BERENICE K. LUNA.
CHARLES A. SPIESS.

Eloisa Luna de Bergere, applicant, being duly sworn, says that the statements in the foregoing claim to which she has subscribed her name in my presence are true.

ATANACIO ROMERO.
Probate Clerk, Santa Fe County, N. M.

Small Holding Application.

Application No. 3212.

OFFICE OF THE UNITED STATES SURVEYOR GENERAL,
SANTA FE, N. M., *September* 6, 1898.

In accordance with section 18 of an act entitled "An Act to establish a Court of Private Land Claims, and to provide for the settlement of private land claims in certain states and territories," Approved March 3rd, 1891 and amended February 21, 1893, and June 27, 1898, I, Alfred M. Bergere, of the County of Valencia, in the Territory of New Mexico, hereby file my claim, to a tract of land not exceeding 160 acres, of which I, through myself and my predecessors or grantors, have been in actual, continuous adverse possession for the last 24 years.

Said claim is not within any grant that has been confirmed by or under the authority of Congress. It is situated in the County of Valencia, Territory of New Mexico, in Township Nos. 6 and 7 North, Range 8 East and A[illegible] of the New Mexico Principal Meridian, and is bounded and described as follows: (Here describe each piece of land claimed separately and accurately.)

Tract No. 1. Beginning at the northwest corner which is a post firmly set in the ground with a mound of earth round it; thence south 78 degrees 23 minutes east, 1124 feet to the northeast corner a post firmly set in the ground with a mound of earth round it;

107 [illegible] south 11 degrees 30 minutes west, 1968.0 feet to southwest corner a post firmly set in the ground with a mound of earth around it. Thence north 78 degrees 23 minutes west, 1124

feet to southeast corner, a post firmly set in the ground with a mound of earth around it, thence north 13 degrees 10 minutes east 1938.9 feet to the northwest corner, the place of beginning. This tract is what is known as the Berrendo Ranch, containing about 50 acres, and is supposed to be situate in T. 7 N. R. 8 E. N. M. P. M. (Unsurveyed) Valencia County, N. M. There are no adjoining claims.

Tract No. 2: Beginning at the northwest corner which is a post firmly set in the ground with a mound of earth around it, thence south 79 degrees 29 minutes east, 2114 feet, to the northeast corner, a post firmly set in the ground with a mound of earth around it, thence south 10 degrees 29 minutes west, 2919.3 feet to southeast corner a post firmly set in the ground with a mound of earth around it. Thence north 97 degrees 29 minutes west, 2114 feet to southwest corner, a post firmly set in the ground, with a mound of earth around it, thence north 10 degrees 24 minutes east, 2919.3 feet to the northwest corner, the place of beginning. This tract is what is known as the Estancia Springs ranch, containing about 98 acres, and lies about 3 miles southerly from tract No. 1 above described. It is supposed to be situate in T. 6 N. R. 8 E., N. M. P. M. (Unsurveyed) Valencia County N. M. There are no adjoining claims.

Tract No. 3: Beginning at the southwest corner which is a post firmly set in the ground with a mound of earth around it, thence south 80 degrees east, 850 feet to southeast corner, a post firmly set in the ground with a mound of earth around it, thence north 20 degrees and 24 minutes east, 625.2 feet to the northeast corner, a post firmly set in the ground with a mound of earth around it, thence north 80 degrees west 850 feet to northwest corner a post firmly set in the ground with a mound of earth around it, thence south 20 degrees 24 minutes west 625.2 feet to southwest corner the place of beginning. This tract is what is known as the Estancia Springs Ranch. Containing about 12 acres, and lies about ¾ of a mile from tract No. 2 above described. It is supposed to be in T. 6 N. R. 8 E., N. M. P. M. (Unsurveyed) Valencia County, N. M. There are no adjoining claims.

ALFRED M. BERGERE, *Applicant.*

(Signature of Applicant, Christian name in full.)

NOTE.—Applicant's signature must be made before two witnesses.

Signed before us as witnesses:

DAVID M. WHITE.

JOHN R. McFIE.

Alfred M. Bergere, applicant, being duly sworn, says that the statements in the foregoing claim, to which he has subscribed his name in my presence are true.

"*Small Holding Application.*

Application No. 4121.

OFFICE OF THE UNITED STATES SURVEYOR GENERAL,
SANTA FE, N. M., *May 5th*, 1899.

In accordance with the provisions of section 18 of an act entitled "An Act to establish a Court of Private Land Claims and to provide for the settlement of private land claims in certain states and Territories, "approved March 3, 1891, and amended February 21, 1893, and June 27, 1898, I Edward M. Otero, of the County of Santa Fe, and Territory of New Mexico, hereby file my claim to a tract of land not exceeding 160 acres, of which I, through myself and ancestors or grantors, have been in actual, continuous adverse possession for the last 20 years, said claim is not within any grant that has been confirmed by or under the authority of Congress. It is situated in the County of Valencia and Territory of New Mexico, in Township No. 6 North, and — Range, No. 8 East, and — of the New Mexico Base and Meridian, and is bounded and described as follows:

(Here describe each piece of land, claimed separately and accurately.)

Beginning at the N. W. corner which is a post firmly set in the ground marked N. W. Corner. Thence south 79 degrees 29 minutes east Va. 12 Degrees 30 minutes east along the south boundary of the Estancia Ranch, A. M. Bergere, a claimant 1017 feet to 109 S. E. corner of the same, 1950 feet to N. E. Corner, a post firmly set in the ground marked N. E. corner, thence south 15 degrees 45 Minutes west, Va 12 ½ degrees east, 3670 feet to S. E. corner a post firmly set in the ground marked S. E. corner. This is also the N. E. corner of the Estancia Ranch, A. M. Bergere, claimant. Thence north 80 degrees west, Va 12 degrees 30 minutes east Along the north boundary of the Estancia Ranch, 850 feet to N. W. corner of same, 1950 feet to S. W. corner. A post firmly set in the ground marked S. W. corner. Thence north 15 degrees ¾ minutes east Va 12 degrees 30 minutes east, 3670 feet to N. W. corner, place of beginning. This claim is bounded on the north by Estancia Ranch S. M. Bergere, Claimant. On the south by the Estancia Ranch, A. M. Bergere, Claimant, and the ranch belonging to ——— On the west by the property of ——— It is situated in Valencia *County* New Mexico, and supposed to be in T. 6 N. R. 8 E., N. M. P. M. (Unsurveyed) It contains about 160 acres.

EDWARD M. OTERO, *Applicant.*
(Signature of applicant, Christian name in full).

Santa Fe, New Mexico, Post Office Address.

NOTE.—Applicant's signature must be made before two witnesses.

Signed before us as witnesses:
RALPH E. McFIE.
N. SALMON.

Edward M. Otero, Applicant, being duly sworn, says that the statements in the foregoing claim, to which he has subscribed his name in my presence are true.

ATANACIO ROMERO,
Probate Clerk, Santa Fe County, N. M.

"*Small Holding Application.*

Application No. 1122.

OFFICE OF THE UNITED STATES SURVEYOR GENERAL,
SANTA FE, N. M., *June* 3, 1899.

In accordance with the provisions of section 17 of an act entitled "An Act to establish a Court of Private Land Claims, and to provide for the settlement of private land claims in certain states and territories," approved March 3, 1891, and amended February 21, 1896, and June 27, 1898, I Nina Otero, of the County of Santa Fe, and Territory of New Mexico, hereby file my claim to tract of land not exceeding 160 acres, of which, I through myself and my ancestors or grantors, have been in actual, continuous, adverse possession for the last 50 years, said Claim is not within any grant that has been confirmed by or under the authority of Congress. It is situate in the county of Valencia, and Territory of New Mexico, in Township No. 6 north and — range No. 8 East, and — of the New Mexico Base and Meridian, and is bounded and described as follows:

(Here describe each piece of land claimed, separately and accurately.)

Beginning at the northeast corner which is also the N. W. corner of the property of ———— on the south boundary of the Estancia Ranch, N. M. Bergere, claimant; a Post firmly set in the ground thence north 79 degrees 29 minutes west Va. 12 degrees 30 minutes west along south boundary of the Estancia Ranch, 1097 feet to S. W. Corner of the same 1242 feet to N. W. Corner, a post firmly set in the ground, marked N. W. Corner; thence south 20 degrees 15 minutes west Va. 12 degrees 30 Minutes east, 1578 feet to southwest corner, a post firmly set in the ground marked S. W. corner. This locating the N. W. corner of the claim of ———— ; thence south 70 degrees, 29 minutes east, Va. 12 degrees 30 minutes east, 1799 to S. E. corner a post firmly set in the ground marked S. E. Corner. Thence north 15 degrees 15 minutes east, Va. 12 degrees 30 minutes east 780 to S. W. corner of the claim of ———— along west boundary of same 1550 feet to N. E. corner, place of beginning. This claim is bounded on the north by the Estancia Ranch, N. M. Bergere, claimant, on the east by claim of ———— and ———— and on the south by claim of ———— and ———— and on the west by claim of ———— It is situated in Valencia County, New Mexico, and supposed to be in T. 6 N., R. 8 E., N. M. P. M. (Unsurveyed). It contains about 160 acres.

NINA OTERO, *Applicant*
(Signature of applicant. Christian name in full.)

Santa Fe, N. M., Post Office Address.

111 NOTE.—Applicant's signature must be made before two witnesses.

Signed before us as witnesses.
RALPH E. McFIE.
A. M. BERGERE.

Nina Otero, Applicant, being duly sworn, says that the statements in the foregoing claim, to which she has subscribed her name in my presence, are true.

ATANACIO ROMERO.
Probate Clerk, Santa Fe County, N. M.

The Supreme Court of New Mexico certifies the following ruling of the District Court upon the admission and rejection of evidence:

1. That the defendants at the close of the plaintiffs' case in chief moved the court below to find the issues in their favor, among others, on the grounds, first, that no demand of possession has been proved ever to have been made upon the defendants for the land in question; second, that as it appears from the plaintiffs' exhibits offered in evidence there was an exception of certain lands from the sale from Miguel E. Pino, to Manuel Antonio Otero, which excepted lands have not been excluded in the proofs from the said Galisteo Grant and not identified; which motion was overruled and they duly excepted.

In Chambers, December 31st, 1903. Before the Court.

2. No. 4265.

BERGERE et al.
vs.
CHAVES et al.

W. S. HOPEWELL sworn on the part of the defendants, testified upon direct examination by Mr. A. B. Renehan, as follows:

Q. State your name and occupation.

A. W. S. Hopewell. I am building a railroad.

Q. You were served, I believe, with a subpoena duces tecum which you were directed to produce here certain papers

112 lative to the Estancia and Berendo Springs lands, were you not? Have you got those papers with you?

A. No, sir.

Q. Where are they?

A. I have no papers in my possession that relate to these matters myself.

Q. Do you know where they are?

A. They are in escrow.

Q. Are they under your control conditionally?

A. Yes, sir; escrow agreement.

Q. What do these papers say with reference to your control of those papers, under what conditions?

Mr. MEDLER: On behalf of the Pennsylvania Development Company I object to this evidence or any other case in which the Pennsylvania Development Company is not a party, or in which the matters in connection with these papers are not in issue; I wish to state here that these papers relate to a sale of certain small holding claims of Estancia and no other, and the Pennsylvania Development Company claims an interest in these papers which is not subject to be inspected by the public, or attorney or court in any case involving the issue, or in which these papers are not material. We further state that we are willing to submit these papers to the inspection of the Court, and if the Court should hold that they are material, we are willing to abide by the decision of the Court, but we object to the papers being submitted or produced by either the witness Hopewell or Mr. D. J. Pelan, the representative of the depository, except under these conditions.

Mr. CONNOR: The plaintiffs object to the offer of proof stated by counsel for the Pennsylvania Development Company and on the grounds that it is an attempt to prove the escrow by secondary evidence.

Mr. EDELMAN: I asked him what the condition was.

The COURT: The objection will be sustained to this question.

Exception.

That condition is that these papers could not be presented except upon the consent of yourself and Mr. Bergere?

113 Mr. GORTNER: The plaintiff objects on the same grounds, and also as leading.

Counsel for the defendants states that the question is not leading, because it is apparent that this witness is an adverse witness up to the present.

Objection sustained.

Exception.

The defendants offer to prove by this witness that the condition referred to is that the witness and Mr. A. M. Bergere the plaintiff in this case administrator, may produce these papers or take them out of the bank by agreement between themselves.

Q. What bank has these papers?

A. The First National Bank.

Q. These papers represent a contract between you and Mr. Bergere for the transfer to you as trustee for the Pennsylvania Development Company or in such capacity of the Estancia and Berrendo springs and in Valencia county, being a part of the Bartolome Baca grant and being small holdings within the confines of that grant as originally claimed are they not.

The plaintiffs object to the question, as calling—not the best evidence and as being leading.

Sustained.

The defendants offer to prove by this witness that the papers in question are under his control to such an extent that he could produce them and that they could be produced on an order of the court, and that they represent a contract between the witness as agent or trustee for the Pennsylvania Development Company, and under

which contract A. M. Bergere agrees to transfer to W. S. Hopewell or to the Pennsylvania Development Company the lands in question for the sum of twenty thousand dollars and we also offer to prove by this witness that on account of that contract he has been paid the sum of $10,800.00 we also offer to prove by this witness and by these papers that the lands in question were the subject of
114 small holding claims in evidence in this case of Eloisa Luna de Bergere, Adelina Otero, Edward Otero, A. M. Bergere and Manuel B. Otero, and that these lands were conveyed to A. M. Bergere by these small holding claimants and other persons claiming the Bartolome Baca grant, including all the plaintiffs in this case, for the purpose of showing that these defendants claim the actual ownership of the Bartolome Baca grant under the deed from Jesus Maria Sena y Baca in evidence in this case, and as showing that interpretation of this contract or deed by the heirs and descendants and assigns of Manuel Antonio Otero, party to the said contract with Jesus Maria Sena y Baca.

The COURT: In the opinion of the Court evidence offered as to the transfer of this property between Bergere and the Pennsylvania Development Company does not tend to throw any light upon the controversy in this case, and is, therefore, immaterial, so far as the court can now see. Counsel for the Pennsylvania Development Company, Mr. Medler has offered to submit these papers to the Court for inspection and counsel for the defendants insists that these papers should also be submitted to him for inspection, so that he may be advised as to the immateriality as by such inspection he can be thoroughly so, and will ask the court to accord the proffer of the counsel for the Pennsylvania Development Company, and that he, counsel for the defendants may have a like opportunity.

Mr. MEDLER: I Object. Sustained.

The defendants except to the ruling of the court upon his offer to prove last above stated.

The COURT: These papers I would be glad to examine that package upon the offer of the counsel for the Pennsylvania Development Company. (The papers are here handed *for* the Court for inspection.)

The COURT: The Court inspected the memorandum of the documents included in the sealed package under the escrow agreement which provides that this package except by the written consent of both these parties to the agreement, and being of the opinion that
the documents enclosed have no relation whatever to the
115 subject matter of this suit, and do not tend to throw any light or give the court any information upon the matter in issue, I, therefore, hold that these documents are wholly immaterial and are not competent evidence in this case, and the matter being a private transaction in escrow the court will decline to demand the production of these papers or interfere with the escrow in any way.

The defendants except to the ruling of the court as to his explanation for the execution of the documents, and on the further ground that it appears from the Court's statement that he bases his rulings upon some memorandum on the back of the documents and not from an inspection of the documents themselves.

Q. Would you consent if Mr. Bergere consent?

The plaintiffs object to allowing these documents to be opened, and object to the taking proof as to this escrow and contract between these parties.

A. I would object to their being opened.

RUFUS J. PALEN, sworn on the part of the defendants, testified upon examination by Mr. A. B. Renehan, as follows:

Q. State your name and business.

A. Rufus J. Palen, president of the First National Bank of Santa Fe.

Q. Are you the custodian referred to in the documents about which the preceding witness was interrogated?

A. The bank has the papers.

Q. The bank of which you are the president? The First National Bank of Santa Fe?

A. Yes, sir.

Q. Have you those papers with you in the court?

A. Yes, sir.

Q. Will you produce them?

Counsel for the Pennsylvania Development Company objects to the introduction and production of these documents for the same reason as stated in the objections to the question bearing upon the testimony of Mr. W. S. Hopewell.

The plaintiffs make the same objections.

Sustained. Exception.

The defendants offer to prove by this witness the same facts set out in their offer to prove by the witness Hopewell, and ask permission of the court to make that proof.

Counsel for the Pennsylvania Development Company objects to the offer for the same reason given above.

Sustained. Exception.

A. M. BERGERE, sworn on the part of the defendants, testified upon direct examination by Mr. A. B. Renehan, as follows:

Q. You are the guardian of Adelina Otero, Eduardo Otero and Manuel B. Otero, and represent them as such, do you not?

A. I do.

Q. You are one of the parties to the escrow agreement about which the preceding witnesses, Major R. J. Palen and W. S. Hopewell, were interrogated?

A. I am.

Q. That agreement in escrow it appears contains the statement that it may be opened by agreement of yourself and Mr. Hopewell in writing; do you consent to the opening of those papers?

The plaintiffs object to the question.

A. I would not consent.

Q. You would not consent?

A. No sir.

Q. Those papers relate to the Estancia and Bernardo Springs land

do they not? and also to shall holding claims in evidence in this case?

The plaintiffs object to the question as being immaterial to the issue in the case on trial.

Sustained.

Counsel for the defendants, under the ruling of the court based upon the endorsement on the back of this escrow agreement that the papers could not be opened except by agreement of the
117 parties, contends that as the best evidence is not producible under that ruling, he be authorized and permitted to offer secondary evidence as to the contents of the papers and asks permission to do so.

The plaintiffs object on the ground that it is secondary evidence and also is immaterial.

The Court: The court having made an inspection of the memorandum as to the documents enclosed in the escrow agreement in the envelope, and being of the opinion that they are immaterial therefore and not competent evidence in this case and not tending to throw any light upon the issues in this case, the objections to the offer of secondary evidence of the contents of the documents if they are produced, will be sustained.

The defendants except to the ruling of the court in excluding secondary evidence of the contents of these papers, and also except to the ruling of the court on the ground that the papers themselves are the best evidence of their contents, if the court would permit them to be opened, and their contents cannot be determined from an inspection of the memorandum of the documents enclosed in the envelope.

Counsel for the plaintiffs states that the inspection made by the court was upon the offer of the counsel for the defendants and the counsel for the Pennsylvania Development Company, and that the memorandum was a portion of the papers, and that the court was on the offer made, entitled to be guided by the documents in the offer, the memorandum being a portion of and description of the papers.

The Court: The memorandum states what the papers enclosed are. Counsel for the defendants makes the further objection on the ground that the ruling of the court is in effect has the effect of the suppression of evidence in this case from the point of view of counsel for the defendants.

Q. Mr. Bergere, will you state how and from whom and in what manner you derived title to the lands embraced in this escrow agreement?

The plaintiffs object to the question as not being the best evidence and as immaterial.

Sustained. Exception.

118 Counsel for the defendants now offers to prove by the witness Bergere who has been shown to be the husband of the plaintiff, Eloisa Luna de Bergere and the step-father and guardian of the three minor plaintiffs, that whatever title he had to the lands embraced within the escrow agreement he acquired by mesne

conveyance from the plaintiffs in the small holding claims in evidence, and are based upon the Bartolome Baca grant rejected, the major portion of which was given to the ancestor and predecessor in the title of the plaintiffs herein, Manuel Antonio Otero, by virtue of a deed from Jesus Maria Sena y Baca to Manuel Antonio Otero dated July 17th, 1878, which is in evidence and the deed from Manuel Antonio Otero to Jesus Maria Sena y Baca, dated June 22, 1878, which is in evidence both on the part of the defendants and on the part of the plaintiffs in this case.

The plaintiffs object to the offer to prove the stated facts and insist upon the proof being offered by questions asked of the witnesses.

Sustained. Exception.

Q. Do you decline to state, Mr. Bergere, the source of whatever title you may have in the lands embraced in this escrow agreement?

A. I do.

Q. From whom and how did you derive whatever title you have which is the subject of this escrow agreement?

The plaintiffs object to the question as not being the best evidence.

Sustained.

Exceptions to the ruling of the Court on the ground that while this is not the best evidence and the best evidence is included in the escrow agreement, which is excluded from inspection, he has no other evidence which he can produce except the oral testimony of this witness and the two preceding witnesses, and asks leave to interrogate the witnesses on these lines.

Counsel for the plaintiffs calls attention to the fact that the best evidence is the absence of the inaccessibility of the originals [illegible] is the record of any real estate titles.

Sustained. Exception.

Q. Have you got the original deeds upon which whatever title you have to this land is based, or are they in your custody or control?

A. I believe they are in the files of the clerk of the court, of the district court, all the deeds that I had.

Q. I refer to the lands within the Bartolome Baca grant which is the subject of the small holding which are in evidence.

The plaintiffs object to the question as assuming a state of facts not proven in the Bartolome Baca grant whatever it may be as the subject of any alleged small holding claims, such assumption being contrary to law and contrary to proven facts in this case, the Bartolome Baca grant whatever it was has ceased to exist.

Q. The Bartolome Baca grant, I have used the expression "Bartolome Baca" grant as a term of description for a tract of land which was claimed as a grant under that name.

The plaintiffs object to the question now as not being easily understood, and ask that it be retramed.

A. I do not understand the question.

Q. Repeat the question.

A. I do not know what you are referring to.

Q. That land mentioned in the escrow agreement.

A. I would not know how to answer that question.

Q. Why not?

A. Because I do not understand it. I do not understand what deeds you are trying to get at.

Q. Then state generally upon what you rely for the lands which are the subject of this escrow agreement.

The plaintiffs object to this question as immaterial to this inquiry.

Sustained. Exception.

Q. You have acquired title or claim to have acquired title to the small holding claims which I have mentioned; now state is it not true that you base that claim of title upon those small holdings and certain deeds from persons claiming interests by reason of being tenants in common under the Bartolome Baca grant rejected of the small holdings and who claim that you and the plaintiffs whom you represent in this case were tenants in common or trustee for their benefit as to that land.

The plaintiffs object to the question as containing inferences repugnant to the law, as seeking to cause this witness to impeach in this proceeding a title under certain small holdings claims not involved in this proceeding; as immaterial to this inquiry and as seeking to prove that the small holding claims mentioned which are necessarily based on possessory rights, are not legally founded on such possessory rights; and as undertaking to tie small holding claims to titles shown by the question itself to have been extinguished; also as seeking to constitute a collateral attack to pending small holding claims.

Sustained. Exception.

The defendants offer to prove by this witness the same facts that we offered to prove by the witnesses Hopewell and Paden, and we also offer to prove by him the particular facts that he purchased from the plaintiffs in this case whatever interests they might have had in the small holdings in question, and that thereupon he made a contract to sell the same land to W. S. Hopewell, and we desire to say to the court that that small holding rights, if any there were, of any of the plaintiffs, are the rights if any accruing under the small holdings in evidence of Jesus Ma Sena y Baca to the Bartolome Baca grant and that thereby it will appear that the plaintiffs seek to claim the ownership of all possessory rights under the Bartolome Baca grant that Jesus Maria Sena y Baca had without tendering back to Jesus Maria Sena y Baca or to his heirs, any rights in the Bartolome Baca grant.

The plaintiffs object to the method of counsel for defendants in offering proof and in offering recital of what he has a right to prove by the witness, and insist that the orderly and proper method of proof is to make interrogations calling for the evidence desired.

121 Sustained. Exception.

Defendants ask if it is understood that the rule is that it is not proper for counsel to make offers of proof after interrogating the witness.

The COURT: I understand that it is the proper method of proof in a case; you see it is within the power of counsel to make offers of proof that they could not under any circumstances prove; it is an inconclusive thing and a method by which justice might be very easily defeated. Counsel might offer to prove a thing that did not exist, and therefore I deem it an improper method of getting proof.

Q. You have sold whatever rights you had or had acquired under these small holdings by means of this escrow agreement to W. S. Hopewell for the sum of twenty thousand dollars or thereabouts, have you not?

The plaintiffs object to the question as immaterial.

Sustained. Exception.

Q. You have received of that purchase price $10,800.00 have you not?

Plaintiffs object to the question as being immaterial.

Sustained. Exception.

Mr. BENEHAN: That is our case.

The plaintiffs offer in evidence one additional deed which we thought we had offered, but in preparing my brief I found that I had left it out. Here is a copy for the defendants.

Marked Plaintiffs' exhibit No. 31.

The COURT: In all these rulings it is intended to limit it to these deeds in escrow?

Mr. BENEHAN: That is what I am endeavoring to reach in this case.

The COURT: I am simply ruling on this escrow matter, a matter outside of this case.

Mr. GORTNER: (Resuming the introduction of the last deed and reading) This is a quit claim deed calling for an interest in the grant made by Emilia Otero de Henriquez to the plaintiffs.

The defendants object to it as immaterial, irrelevant and incompetent, taken subject to the objection.

The COURT: The case is closed on both sides?

And so we find and certify.

SUPREME COURT OF THE TERRITORY
OF NEW MEXICO.
(Signed) By WILLIAM H. POPE,
Its Chief Justice.

Said findings of fact were and are endorsed on the back thereof as follows, to-wit: "No. 1180. In the Supreme Court, County of Eloisa L. de Berger, et al., Appellees, vs. Luciano Chaves

et al., Appellants. Findings of Fact Filed in my office this March 31, 1910. Jose D. Sena, Clerk. Reneham & Davies, Rooms 15, 16, 17, and 18 Catron Block, Santa Fe, N. M., Attorneys for Appellants.

And Afterwards on towit, on the 6th day of April A. D., 1910 there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico and entered of record, an order extending the time to perfect and file transcript in the above entitled cause which said order of Extension of time was and is in the following words and figures towit:

In the Supreme Court of the Territory of New Mexico.

ELOISA L. DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES et al., Appellants.

No. 1180.

Appeal From District Court, Santa Fe County.

This cause having come on to be heard upon the motion of the appellants, Luciano Chaves et al. for further time for the completion of transcript of record an appeal to the Supreme Court of the United States, and sufficient reasons appearing therefor:

It is ordered that the time for the completion of the transcript in said cause, and for the docketing and perfecting of an appeal taken, in the Supreme Court of the United States, to and the same hereby is extended for thirty days from the date. This April 2nd, 1910.

WILLIAM H. POPE,
Chief Justice Supreme Court of the Territory of New Mexico.

which said order of extension was and is endorsed on the back thereof as follows towit: "No. 1180, Eloisa L. de Bergere et al. Appellees vs. Luciano Chavez et al. Appellants. Order of Extension of Time. Filed in my office this April 6th, 1910. Jose D. Sena, Clerk.

And Afterwards, towit on the 25th day of April A. D., 1910 there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico an assignment of errors on appeal to the United States Supreme Court in the above entitled cause, which said assignment of errors was and is in the following words and figures following to wit:

In the Supreme Court of the United States of America, October Term, 1910.

LUCIANO CHAVES et al., Appellants,
vs.
ELOISA L. DE BERGERE et al., Appellees.

No. —.

Now comes the appellants and assign error in the said cause as follows, to-wit:

1. The lower court erroneously excluded the evidence demanded of the witness Hopwell Bergere and Pyles concerning certain deeds in exhibit, because such exclusion was contrary to the rules of evidence and because the evidence so sought was material at least to show that the plaintiffs and their privies interpreted the so-called contract of June 22, 1878, and the deed of July 17th, 1878, as constituting executed sales and contracts. (See Findings 19, 20 and 21).

2. The lower court erred in overruling the offers to *proof* by the defendants below, in connection with the said deeds so in error and the excluded evidence asked of the said witnesses Hopwell Bergere and Pyles, because such exclusion was contrary to the rules of evidence and because the evidence so sought was material at least to show that the plaintiffs and their privies interpreted the so-called contract of June 22, 1878, and the deed of July 17, 1878, as constituting executed sales and contracts. (See findings 20 and 21).

3. The court erred in holding that the agreement of June 22, 1878, was executory and not executed, for it should have held such agreement, according to its face and according to the evidence, as executed.

4. The court erred in holding against the defendants' plea of the statute of limitations, as giving title and right of possession, if the said contract of June 22, 1878, was originally merely executory, because such holding was contrary to the evidence and contrary to the law.

5. The court erred in not holding good and well taken the motion made by the defendants at the close of the plaintiffs' cause in chief, to-wit, to find the issues in the defendants' favor, on the grounds, among others, (*a*) that no demand of possession or notice to quit had ever been made or given, and, (*b*) that there was an exception and exclusion of certain lands from the deed by Miguel E. Pino to Manuel Antonio Otero, which is the foundation deed in the case, which excepted lands have not been excluded in the proofs from the lands in issue and not identified by any evidence, so that it does not appear but that the excepted lands are the real lands in issue, since the Gallistco patch or grant was cut down by the Court of Private Land Claims from 24,000 acres to 317 acres.

6. The court erred finally in not dismissing the complaint for

failure of the plaintiffs, during the whole case, to show that the lands sued for were the lands conveyed by Miguel E. Pino, to
125 Manuel Antonio Otero and not the lands excluded from such sale and conveyance.

7. The court erred in not holding that the plaintiffs were estopped by laches from ascertaining title to the Galisteo tract or any part of it as against the defendants, having stood mute since September 7, 1881, when the Baca grant was rejected, until April 3, 1901, when their complaint herein was filed.

8. The court erred in not holding that there was a presumption of deed given on account of the lapse of time and acts done, even if the said so-called contract of June 22, 1878, was at its date an executory contract.

9. The court erred in entering judgment in favor of the plaintiffs for all the reasons herein stated, and in denying the defendants' motion for findings, and in overruling defendants' objections to the court's finding.

A. N. REHEHAN,
Attorney for Appellants.

Which said assignment of errors on appeal to the United States Supreme Court, was and is endorsed on the back thereof, as follows, to wit: "No. 1180. In the Supreme Court of the Territory of New Mexico.—Eloisa Luna de Bergere, et al., Appellees, vs. Luciano Chavez et al., Appellants. Assignment of errors on Appeal to the United States Supreme Court. Filed in my office this Apr. 25 1908. Jose D. Sena, Clerk. Reheban & Davies, Santa Fe, N. M. Rooms 15, 16, 17 and 18 Catron Block, Attorneys for Appellants."

And Heretofore on to-wit on the fourteenth day of January, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court was and is in the following words and figures *following* to-wit:

126 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1908.

No. 1180.

ELOISA LUNA DE BERGERE et al., Appellees,
vs.
LUCIANO CHAVES et als., Appellants.

Appeal from District Court, Santa Fe County.

Syllabus.

1. Tenants in common need not join in a suit in ejectment to recover possession of lands, although they may do so if they so desire.

2. A tenant in common may sue separately in ejectment, and if the defendant shows no title, he is entitled to recover possession of the entire estate, in subordination however, to the rights of his co-tenants.

3. The case of Nehr vs. Armijo, 29 N. M. 327, is reversed so far as it holds that if a tenant in common sues alone in ejectment, he can recover only his own interest in the estate.

4. In the case at bar the paper relied on is not a deed, but is an executory contract, for the giving of a deed to the Gallinas Ranch, by Manuel A. Otero, to Jesus Ma. Sena y Baca, upon the approval of the Bartolome Baca Grant.

5. The instrument in writing, under which Jesus M. Sena y Baca took possession of the Gallinas Ranch, being an executory contract, the statute of limitations, under which title by adverse possession might be gained would not begin to run, until Sena y Baca, or those claiming under him, distinctly and unequivocally repudiated the deed of Manuel A. Otero, to the Gallinas Ranch.

27 *Statement of Facts*

This is a suit in ejectment, brought by the plaintiffs, to recover the possession of a certain tract of land situated in Santa Fe County, New Mexico, and known as the "Gallinas Ranch". A jury was waived and the evidence in the case was taken by Hon. John R. McFie, Judge of the First Judicial District Court of the Territory of New Mexico, for on March 2nd A. D. 1906 the said Judge disqualified himself, and by consent of all the parties the cause was referred to the Hon. Edward A. Mann, Associate Justice of the Supreme Court of this Territory, who heard the arguments and rendered a judgement in the case.

It will be necessary to trace the title to the Gallinas Ranch back to June 22nd, 1878, at which time the title to the ranch was in dispute, so it is necessary for all of the parties to this controversy trace their claims to him, as the common source.

On the said 22nd, 1878, Manuel A. Otero and one Jesus M. Sena y Baca entered into a contract or agreement, written in Spanish, a translation of which reads as follows, to-wit:

Know all men by these presents: That I, the undersigned, Manuel Antonio Otero, resident of the county of Valencia, in the Territory of New Mexico, for consideration, have sold and transferred in favor of Jesus M. Sena y Baca and Arcadia Ortiz, his wife, a ranch known as the Ranch of Gallinas, which is situated in the county of Santa Fe and Territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino, and that I will give and execute the documents of conveyance of the said ranch in favor of Jesus M. Sena y Baca and Arcadia Ortiz as soon as there shall be delivered and approved by the Surveyor General the Grant of Bartolome Baca of a tract which was ceded to him by the Governor Melgarez in the year 1819, and ... the which is situate in the county of Valencia in the Territory of New Mexico, and furthermore, they

will take possession of the aforesaid ranch and will have and enjoy all the products of the same until the proper documents may
128 be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me.

In Witness Whereof, we sign the present in La Constancia, County of Valencia, this 22nd day of June, A. D. 1878.

MANUEL A. OTERO.
JESUS M. SENA Y BACA."

Under this contract or agreement Sena y Baca went into possession of the lands in controversy and so remained until his death in the year 1885, when his rights descended to his widow, who continued in possession until July 10, 1888, when she quit-claimed her rights in it to one Jesse D. Rumberg, and at the same time delivered to him the original contract or agreement between her husband and Otero, both of which instruments Rumberg had placed of record. Rumberg continued in possession of the property until July 18th, 1889, when he quit-claimed the same to Jose de la Cruz Chaves, and from Jose de la Cruz Chaves, the property came into the possession of his heirs at law, the defendants herein. The contract or agreement between Sena y Baca and Otero, and which is set out above, was introduced over the objection of the plaintiffs and was introduced in evidence on the trial of this case. Indeed, the contract or agreement seems to have been executed in duplicate, as both the plaintiffs and defendants have one which are identical except that the one held by the defendants has certain interlineations in it setting out a consideration of $1000.00, for the alleged sale. During all of the time that the property was in the possession of Sena y Baca and his privies, their possession was continuous. They farmed the land, made certain improvements on it by building fences and acequias, have received rentals for parts of it which was farmed on shares and have exercised all of the control over the property which its owner might do.

The evidence discloses that Manuel Antonio Otero attempted to get the Bartolome Baca Grant, approved by the Surveyor General of New Mexico, but that official made an unfavorable report
129 the validity of the grant, and recommended that it be rejected, but before congress took any action on this report of the Surveyor General, the Court of Private Land Claims was created and empowered to adjudicate and determine the validity of land grants made by the Governments of Spain and Mexico in New Mexico and other Territories. The Oteros presented their claim for the confirmation of the Bartolome Baca Grant before the court of Private Land Claims, and secured a favorable decision from the court for a part of the grant, but on appeal the Supreme Court of the United States in 1897, finally rejected the grant.

After the creation of the court of Private Land Claims the successors of Sena y Baca, brought a proceeding in such court for the confirmation of the Galisteo Grant, and succeeded in getting the

part of it known as the "Galisteo Ranch," the property in controversy, confirmed.

On April 3rd, 1901, after the final rejection of the Bartolome Baca Grant, the plaintiffs herein, as heirs of Manuel Antonio Otero, brought this suit to recover the possession of the Galisteo Ranch.

Judgment was finally entered by the Learned Judge below in favor of the plaintiffs, and from such judgment the defendants appealed to this court.

Opinion of the Court.

MILLS, C. J.:

It is evident from an examination of the record that this case was ably contested by the attorneys for both the plaintiffs and the defendants, and that every effort was used to secure and present to the trial court all of the evidence which minds trained in the subtleties of legal procedure by many years of active practice before the courts believed would be useful to the respective sides which they represented in the controversy now before us.

The questions discussed by counsel in their briefs are numerous, and involve complicated points of law, but in our opinion the
730 real questions on which this case must finally be decided can be compressed into a small compass, by brushing to one side, that under our opinion of this case, are collateral and comparatively unimportant matters, many of which are elaborately argued in the briefs submitted to us by counsel. We will endeavor to dispose of this case along these lines.

1. We do not consider as well taken the contention of the appellants that the plaintiffs below could not maintain this suit without joining their tenants in common as parties. No provision of our laws, so far as we are aware, requires that all of the tenants in common should join in a suit to recover possession of real property. In fact this court has held in Nelson vs. Armijo, 9 N. M. 325, "Defendant insists that these plaintiffs as tenants in common could not be joined as parties plaintiff, and their having so joined is fatal to their case. We do not interpret the law to be as defendant contends, but believe the better rule to be that tenants in common may join in ejectment and recover the whole property demanded as held by them in common, or they may sue separately and recover each one only his whole interest." The opinion in the Nelson vs. Armijo case, that tenants in common may join in an ejectment suit and "recover the whole property demanded so held by them in common or they may sue separately and recover," is we think correct, but we think that that case is incorrect in limiting such recovery, in case a suit is brought by one of several tenants in common to, "each one only his whole interest," and to that extent the case of Nelson vs. Armijo is reversed. We think the true rule to be that a tenant in common may sue separately in ejectment, and that if the defendant shows no title, he is entitled to recover possession of the entire estate "in subordination, however, to the rights of his cotenants." As is well said in Hardy v. Johnson, 1 Wall.

371.—"The action of ejectment determines no rights but those of present possession; and that one tenant in common has such
131 right as against all parties but his cotenants, or persons holding under them is not questioned."

That a tenant in common may sue without joining the other tenants in common is also held as late as 1898, when the supreme court of the United States quotes approvingly from 12 D. C. App. 51, 60, as follows, to wit: "The original rule at common law was that tenants in common could only sue separately, because they were separately seized, and there was no privity of estate between them. Mobley vs. Brunier, 59 Pa. St. 181; Corbin v. Cannon, 31 Miss. 570, 572; May v. Slade, 24 Texas, 205, 207; 4 Kent Com. 368."

"The practice soon became general, however, in the United States to permit them to sue either jointly or severally as they might elect 7 Ency. P. & P. 346, and cases cited. This seems to have been the practice in the District of Columbia, and, so far as we are advised, has never been questioned. Tenants in common may join in an action if they prefer to do so, but it is with the risk of the failure of all if one of them fail to make out a title or right to possession." And the supreme court adds to this quotation the words, "These remarks express the rule correctly." Davis vs. Coldens, 174 U. S. 719. The law is also laid down in 15 Cyc. 8, to be, that it is not necessary that all the tenants in common should unite in the action, although they may join in it for their common estate.

2. We will now consider the agreement in writing signed by Otero and Sena y Baca, on which this controversy is largely based to determine whether it is a deed or an agreement to convey, for the decision of this point is of vital importance to the parties to this case.

From the standpoint of performance contracts have been divided into two classes, executed and executory. "A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift
132 consummated is as valid in law as anything else. Dartmouth College vs. Woodward, 4 Wheat. 518. An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration that something is to be done or not to be done by one or both of the parties. Only a slight consideration is necessary. Pillans vs. Van Mierop, 3 Burr. 1663; Forth vs. Stanton, 1 Saund. 210, Note 2, and the cases there cited." Farrington vs. Tennessee, 95 U. S., 679.

An examination of the contract or agreement entered into between Otero and Sena y Baca, and which is set out in full in the statement of facts preceding this opinion, convinces us that it was an executory contract, (although it contains words of present purchase and sale), for the conveyance of the Galisteo Ranch by Otero to Sena y Baca, depends upon the happening of a certain contingency, viz: the adjudication and approval of the Bartolome Baca Grant. The wording of the contract provided that Sena y Baca

could take possession of the Galisteo Ranch and enjoy the products of the same, until the proper documents were executed to convey the title to him, which documents were to be executed on the favorable adjudication and approval (confirmation) of the Bartolomé Baca Grant. The wording of the agreement is unequivocal and plain, that the deed of conveyance to the Galisteo Ranch was to be made when the Bartolomé Baca Grant was favorably adjudicated and approved. Nor can it be contended that the contract of June 22nd 1898, was a deed, for it is signed by both Otero and Sena y Baca, and not alone by Otero, the then owner of the Galisteo Ranch. If the instrument in question had been signed by Otero alone, there would have been more force than now exists in the contention of the appellants that it was a deed transferring the title to real estate, rather than a mere agreement to execute deeds to convey on the happening of certain events. Another thing which leads us to conclude that the writing was an executory contract and
133 not a deed is that it is not acknowledged before any officer having the power to take acknowledgments to deeds, nor before any one, and as long ago as 1852, our legislature passed an act which was approved on January 12th, of that year, which provided in Sec. 5, that, "every instrument in writing by which real estate is transferred or effected, in law or equity, shall be acknowledged and certified (?) in the manner hereinafter prescribed." Section 6 of the same acts, sets out the officers before whom such acknowledgements might be taken. This law was in force at the time of the signing of the agreement or contract on June 22nd, 1898, and must have been known to the parties who signed it, for the evidence discloses that one of them at least was a man of affairs and one who was familiar with the working of the legislative bodies of the territory.

In arriving at a conclusion as to whether or not the writing which is the basis of this controversy is a deed or contract, we must consider it as an entirety. We cannot pick out a few words or a line here and there, and determine from them what it is. As the Supreme Court of the United States says, "We agree generally that although there are words of conveyance in present in a contract for the purchase and sale of lands, still, if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey, and not a conveyance. The whole question is one of intention to be gathered from the instrument itself. Jackson v. Monerief, 5 Wend. 25; Ogden v. Brown, 33 Penn. St., 247; Philips v. Sweuk 120 Penn. St. 76, "Williams v. Paine 169 U. S., 55.

We have gone over the written instrument dated June 22nd, 1898, very carefully, and have come to the conclusion that it is not and was not intended to be a deed for the conveyance of the Galisteo Ranch, but that it was an executory contract, by the terms of which a deed for its conveyance was to be delivered by Manuel Antonio Otero to Jesus Sena y Baca, on the favorable adjudication
134 and confirmation of the Bartolome Baca Grant. As the Bartolome Baca Grant was finally rejected by the Supreme Court

of the United States no necessity arose for Otero or his heirs to give deeds of conveyance for the Galisteo Ranch.

3. Holding that the instrument in writing under which Sena y Baca took possession of the Galisteo Ranch and held the same was an executory contract, we must determine the nature of the possession of the said ranch by Sena y Baca and his successors in title, with the view of determining whether or not title has been acquired by adverse possession.

The evidence in this case discloses that Sena y Baca in obtaining the confirmation of the Galisteo Grant, deraigned his title through Manuel Antonio Otero by virtue of the executory contract, and thus recognized the title of his vendor to the premises. No claim was made by the defendants that their title arose from any other source.

Sena y Baca then, entered into the possession of the lands in controversy by virtue of the contract, and with the permission of Manuel Antonio Otero, and it is generally held that a possession by permission or license from the owner is not adverse and cannot ripen into title, no matter how long continued or however exclusive it may be. 1 Cyc. 1030, and cases cited in Note 66, from twenty-seven states, and from England, Canada, and the Supreme Court of the United States. The possession of the occupant under such circumstances is considered as the possession of him upon whose pleasure it continues. Pulaski County v. State, 12 Ark., 118, and again in 1 Cyc. 1011, the rule is stated to be, and many cases are cited in its support, that, "Where one enters into and holds possession of lands under an executory contract of purchase or deed of title, the entry and possession are in subordination to the title for the vendor until payment or performance of all the conditions by the vendee, or until the vendee has distinctly and unequivocally repudiated the title of his vendor, which repudiation is brought expressly or by legal implication to the vendor's knowledge." The reason for this rule forbidding a person who has gone into possession under a contract to purchase is the injustice of allowing a person who has obtained possession by admitting title of another, to enjoy that title, and, in case of failure of proof of it, hold the premises himself. Howard v. McKenzie, 54 Texas 171; Kirk vs. Taylor, 8 B. Monroe (Ky.) 262; McKelvain v. Allen, 58 Tex. 383; Clouse v. Elliott 71 Ind. 302.

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The evidence in this case nowhere discloses that Sena y Baca or his assigns, ever distinctly and unequivocally repudiated the title of Manuel Antonio Otero. When Sena y Baca disposed of whatever title he had in the Galisteo Ranch to Rumberg, he did so by a quit-claim deed, and handed Rumberg the executory contract which he had in his possession, and this contract appears to have always been given to the occupants of the real estate in controversy down to the present day, for we find it in the possession of the defendants, when this suit is brought, and it is introduced by them in evidence, to support their claim that they own the property in fee.

We are aware that many points are raised in the briefs of both appellants and the appellees which we have not discussed, but as

before stated, under the view which we have taken of this case, we do not think that it is necessary for us to discuss or determine them, and we therefore refrain from so doing, although we have read and considered them with much care.

Finding no reversable error in the judgment of the court below, the same is therefore affirmed; and, It Is So ordered.

WILLIAM J. MILLS
Chief Justice, etc.

We Concur:

W. H. POPE, *A. J.*
FRANK W. PARKER, *A. J.*
IRA A. ABBOTT, *A. J.*

McFie, A. J., having heard a part of this case below, and Mann, A. J., having decided the case below, took no part in this decision.

TERRITORY OF NEW MEXICO
Supreme Court.

I, Jose D. Sena, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing is a full true and complete copy of the transcript of record and proceedings, findings and opinion filed in the above entitled cause, which is now submitted to the Supreme Court of the United States, in accordance with the appeal heretofore granted herein.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 23d day of April, A. D. 1910.

[SEAL.]

JOSÉ D. SENA,
Clerk Supreme Court of N. M.

In the Supreme Court of the United States, October Term, 1910.

No. —.

LUCIANO CHAVES et al., Appellants
vs.
ELOISA LUNA DE BERGERE et al., Appellees.

Assignments of Error.

Now come the appellants and assign error in the said cause as follows, to-wit:

1. The lower court erroneously excluded the evidence demanded of the witness H. Jewell Bergere and Polan concerning certain bids in escrow because such exclusion was contrary to the rules of evidence and because the evidence so sought was material at least to show that the plaintiffs and their privies interpreted the so-called grant of June 22, 1878, and the deed of July 17, 1878, as constituting executed sales and contracts. (See findings 20 and 21.)

2. The lower court erred in overruling the offers to proof by the defendants below in connection with the said deeds in escrow and the excluded evidence asked of the said witnesses, Hopewell, Bergere and Eden, because such exclusion was contrary to the rules of evidence and because the evidence so sought was material at least to show that the plaintiffs and their privies interpreted the so-called contract of June 22, 1878, and the deed of July 17, 1878, as constituting executed sales and contracts. (See findings 20 and 21.)

3. The court erred in holding that the agreement of June 22, 1878, was executory and not executed, for it should have held such agreement, according to its face and according to the evidence, as executed.

4. The court erred in holding against the defendants' plea of the statute of limitations, as giving title and right of possession, if the said contract of June 22, 1878, was originally merely executory, because such holding was contrary to the evidence and contrary to the law.

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5. The court erred in not holding good and well taken the motion made by the defendants at the close of the plaintiffs' case in chief, to-wit, to find the issues in the defendants' favor on the grounds, among others, (a) that no demand of possession or notice to quit had ever been made or given, and (b) that there was an exception and exclusion of certain lands from the deed by Miguel E. Pino to Manuel Antonio Otero, which is the foundation deed in the case, which excepted lands have not been excluded in the proof from the lands in issue and not identified by any evidence, so that it does not appear but that the excepted lands are the real lands in issue since the Galisteo ranch or grant was cut down by the Court of Private Land Claims from 24,000 acres to 317 acres.

6. The court erred finally in not dismissing the complaint for failure of the plaintiffs, during the whole case, to show that the lands sued for were the lands conveyed by Miguel E. Pino to Manuel Antonio Otero and not the lands excluded from such sale and conveyance.

7. The court erred in not holding that the plaintiffs were estopped by laches from asserting title to the Galisteo ranch or any part of it as against the defendants, having stood mute since September 7, 1881, when the Baca grant was rejected, until April 2, 1901, when their complaint herein was filed.

8. The court erred in not holding that there was a presumption of deed given on account of the lapse of time and acts done, even if the said so-called contract of June 22, 1878, was at its date an executory contract.

9. The court erred in entering judgment in favor of the plaintiffs for all the reasons herein stated, and in denying the defendants' motion for findings & in overruling defendants' objections to the court's findings.

A. B. RENEHAN
Attorney for Appellants

139 [Endorsed:] No. 1180. In the Supreme Court, Territory of N. M. January Term, 1910. Eloisa L. de Bergere et al. appellees vs. Luciano Chavez et al. appellants. Assignment of Errors on Appeal to the U. S. S. C. Filed in my office, This Apr. 25, 1910. Jose D. Sena, Clerk. Reneham & Davies, Rooms 15, 16, 17, and 18, Catron Block, Santa Fe, N. M., Attorneys for ——.

Endorsed on cover: File No. 22,134. New Mexico Territory Supreme Court. Term No. 83. Luciano Chavez, Apolonio Chavez, Gregorio Chavez et al., appellants, vs. Eloisa Luna de Bergere, Alfred M. Bergere, Adelina Otero et al. Filed May 2d, 1910. File No. 22,134.

9

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JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1912.

No. 5

LUCIANO CHAVEZ ET AL., *Appellants*,

vs.

ELOISA LUNA DE BERGERE ET AL., *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

APPELLANTS' BRIEF.

A. B. RENEHAN,
Attorney for Appellants.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1912.

No. 43.

LUCIANO CHAVEZ ET AL., *Appellants*,

vs.

ELOISA LUNA DE BERGERE ET AL., *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

APPELLANTS' BRIEF.

STATEMENT.

This was an action in ejectment but was tried to the court without a jury, and is here for review on a statement of facts made by the Supreme Court of New Mexico.

It involves the title to the Galisteo Ranch, a part of the Galisteo grant.

On the 22nd of June, 1878, Manuel A. Otero claimed ownership of an undefined part of the Galisteo grant, then pur-

porting to contain 24,000 acres, which the Court of Private Land Claims reduced to 317 acres. At the same time Jesus Maria Sena y Baca owned, or claimed to own, a considerable interest in the Bartolome Baca grant. On that date a contract was made between the two men, under which Otero recited: "I, * * * for consideration have sold and transferred in favor of Jesus Maria Sena y Baca and Ycapita Ortiz, his wife, a ranch known as the ranch of Galisteo * * *, known as the ranch which was formerly of the deceased, Don Miguel E. Pino; and that I will give and execute the documents of conveyance * * * as soon as there shall be adjudicated and approved by the Surveyor General the Grant of Bartolome Baca of a tract * * *, and furthermore, they will take possession of the aforesaid ranch and will have and enjoy all the products of the same until meanwhile the proper documents may be executed * * *." (R. p. 57.)

Afterwards, on July 17th, 1878, Sena y Baca conveyed to Otero his interest in the Bartolome Baca grant. The record is silent as to whether on June 22nd, 1878, any other stipulation concerning the Baca grant existed than that found in the contract of that date.

Otero derained title to the Galisteo grant or ranch from Miguel E. Pino by deed dated December 25, 1850. (R. p. 67.) But from that deed were excepted three separate tracts the breadth but not the length of which is proven. They were probably what is known in New Mexico as *angitos* or strips running from one end to the other of an embracing tract. There was no exclusion of the reservations or exceptions from the Pino deed made in the evidence of the plaintiffs, and no indication that the parcels so excepted and reserved were not the identical land claimed against the defendants.

Sena y Baca entered upon the land, farmed it and otherwise enjoyed it from June 22nd, 1878, until his death in 1885, when his rights passed to his widow, Ycapita Ortiz, who continued in possession until July 10, 1888, when she conveyed the land by quitclaim to Rumberg, who continued in possession until July 18, 1889, when he quitclaimed his rights to

Jose de la Cruz Chavez, the ancestor of the defendants. Chavez and his descendants remained in possession continuously. Sena y Baca and his successors in possession and title cultivated and improved the land, built ditches and fences, paid some taxes and received the rents and profits, and, in the language of the Supreme Court of New Mexico, "have exercised all of the possessory rights consistent with claim of ownership, but all consistent with the right to possess and enjoy the property conferred by the said agreement of 1878."

Manuel A. Otero applied to the Surveyor-General of New Mexico for the adjudication and approval of the Baca grant, but that officer, on September 7, 1881, made report to the Commissioner of the General Land Office, recommending that the grant be rejected. Notwithstanding this action, Otero in no way interfered with the possession of Sena y Baca, nor did he question his right thereto.

When the Court of Private Land Claims was created Otero applied for the confirmation of the Bartolome Baca grant. That court confirmed it in 1893, but on appeal to the Supreme Court of the United States it was rejected. Sena y Baca's successors, Luciano Chavez, et al, the appellants in this case, filed their petition, in the Court of Private Land Claims, soon after its institution, for quieting the title of the Galisteo grant, claiming 24,000 acres, but it was confirmed for only 317 acres.

This suit in ejectment was not begun until the 3rd day of April, 1901, and it was begun without notice to the defendants to quit. There was no proof of notice to quit. The defendants plead the general issue and the statute of limitations.

Under the Small Holding Law, a part of the Act approved March 3, 1891, establishing the Court of Private Land Claims, several of the defendants, and their pretended predecessors in title to the Bartolome Baca grant, filed small holding claims to land within that grant, within which the interest of Sena y Baca conveyed to Manuel A. Otero was undivided, to-wit: Eloisa Luna de Bergere, Alfred M. Bergere, Edward M. Otero and Nina Otero (R. pp. 63, 64, 66, 67).

"From the date of the disapproval by the Surveyor-General

of the Bartolome Baca grant on September 7, 1881, Jesus Maria Sena y Baca, his widow, Agapita Ortiz de Sena, and her grantees remained in undisputed and undisturbed possession of the said premises, using (and openly claiming the same as their sole property), and returning the same for taxes and paying some, but not all the taxes thereon, without demand therefor, or return thereof being claimed by Manuel Antonio Otero, or any blood or contract privy of his, or any other person, until the institution of this suit." (13th finding, R. p. 59.)

The findings are somewhat inconsistent in that the first, second, fourteenth and fifteenth findings (R. p. 57, 60) declare, in substance, that Manuel A. Otero up to June 22, 1878, held a part of the Galisteo Ranch as an unconfirmed title from the Mexican government, that all the parties traced their claim to this common source, that the defendants deraigned their alleged title in a chain necessarily passing through Manuel Antonio Otero, but, and this is the inconsistency, the title and claim of Miguel E. Pino, from Manuel Antonio Otero deraigned, contained reservations and exceptions of several tracts within the outboundaries of said grant or ranch as claimed to contain 24,000 acres. * * * and Manuel Antonio Otero took title to the said grant or ranch, but not to the said reserved and excepted tracts, and that the plaintiffs (R. p. 61) have not excluded said reservations and exceptions from the land demanded in suit, and have not shown that the Galisteo grant, or ranch, as finally confirmed, is not identical with such reservations and exceptions, or within them.

At the close of plaintiffs' case in chief, the defendants moved the court below to find the issues in their favor, among others, on the grounds, first, that no demand of possession has been proved ever to have been made upon them for the land in question; second, that as it appears from the plaintiffs' exhibits offered in evidence, there was an exception of certain lands from the sale by Miguel E. Pino to Manuel Antonio Otero, which excepted lands have not been excluded in the proofs from the said Galisteo grant and not identified. The motion was overruled and an exception allowed (R. p. 68).

The lower court excluded evidence offered by the plaintiffs for the purpose of showing that the plaintiffs interpreted the contract of June 22, 1878, as executed. The evidence sought to be educed would have shown, in addition to the small holding claims filed, that the plaintiffs had sold and disposed of these interests within the Bartolome Baca grant for a large sum, thus indicating an intention to hold what they had, that is to say, the undivided portion procured from Sena y Baca, that they made no offer to return that portion of that grant which had been conveyed to them for the equivalent reconveyance to them of the Galisteo ranch or grant. Exceptions to the rulings of the court in these respects were taken. The evidence, badly transcribed, is as follows:

W. S. HOPEWELL, sworn on the part of the defendants, testified upon direct examination by Mr. A. B. Renehan, as follows:

Q. State your name and occupation.

A. W. S. Hopewell. I am building a railroad.

Q. You were served, I believe, with a subpoena duces tecum in which you were directed to produce here certain papers relating to the Estancia and Berendo Springs lands, were you not? Have you got those papers with you?

A. No, sir.

Q. Where are they?

A. I have no papers in my possession that relate to these matters myself.

Q. Do you know where they are?

A. They are in escrow.

Q. Are they under your control conditionally?

A. Yes, sir; escrow agreement.

Q. What do these papers say with reference to your control of those papers, under what conditions?

Mr. Medler:

On behalf of the Pennsylvania Development Company I object to this evidence or any other case in which the Pennsylvania Developemnt Company is not a party, or in which the matters in connection with these papers are not in issue.

I wish to state here that these papers relate to a sale of certain small holding claims at Estancia and no other, and the Pennsylvania Development Company claims an interest in these papers which is not subject to be inspected by the public, or attorney or court in any case involving the issue, or in which these papers are not material. We further state that we are willing to submit these papers to the inspection of the Court ,and if the Court should hold that they are material, we are willing to abide by the decision of the Court, but we object to the papers being submitted or produced by either the witness Hopewell or Mr. R. J. Palen, the representative of the depository, except under these conditions.

Mr. Gortner:

The plaintiffs object to the offer of proof stated by the counsel for the Pennsylvania Development Company and on the grounds that it is an attempt to prove the escrow by secondary evidence.

Mr. Reuehan:

I asked him what the condition was.

The Court:

The objection will be sustained to this question.

Exception.

That condition is that these papers could not be presented except upon the consent of yourself and Mr. Bergere?

Mr. Gortner:

The plaintiff objects on the same grounds, and also as leading.

Counsel for the defendants states that the question is not leading, because it is apparent that this witness is an adverse witness up to the present.

Objection sustained.

Exception.

The defendants offer to prove by this witness that the condition referred to is that the witness and Mr. A. M. Bergere the plaintiff in this case administrator, may produce these papers or take them out of the bank by agreement between themselves.

Q. What bank has these papers?

A. The First National Bank.

Q. These papers represent a contract between you and Mr. Bergere for the transfer to you as trustee for the Pennsylvania Development Company or in such capacity of the Estancia and Berrendo springs land in Valencia county, being a part of the Bartolome Baca grant and being small holdings within the confines of that grant as originally claimed, are they not?

The plaintiffs object to the question, as calling—not the best evidence and as being leading.

Sustained.

The defendants offer to prove by this witness that the papers in question are under his control to such an extent that he could produce them and that they could be produced on an order o fthe court, and that they represent a contract between the witness as agent or trustee for the Pennsylvania Development Company, and under which contract A. M. Bergere, agrees to transfer to W. S. Hopewell or to the Pennsylvania Development Company the lands in question for the sum of twenty thousand dollars and we also offer to prove by this witness that on account of that contract he has been paid the sum of $10,800.00; we also offer to prove by this witness and by these papers that the land in question were the subject of small holding claims in evidence in this case of Eloisa Luna de Bergere, Adelina Otero, Edward Otero, A. M. Bergere and Manuel B. Otero, and that these lands were conveyed to A. M. Bergere by these small holding claimants and other persons claiming the Bartolome Baca grant, including all the plaintiffs in this case, for the purpose of showing that these defendants claim the actual ownership of the Bartolome Baca grant under the deed from Jesus Maria Sena y Baca in evidence in this case, and as showing that interpretation of this contract or deed by the heirs and descendants and assigns of Manuel Antonio Otero, party to the said contract with Jesus Maria Sena y Baca.

The Court:

In the opinion of the Court evidence offered as to the trans-

fer of this property between Bergere and the Pennsylvania Development Company do not tend to throw any light upon the controversy in this case, and is, therefore, immaterial, so far as the court can now see. Counsel for the Pennsylvania Development Company, Mr. Medler has offered to submit these papers to the Court for inspection and counsel for the defendants insists that these papers should also be submitted to him for inspection, so that he may be advised as to the immateriality as by such inspection he can be thoroughly so, and will ask the court to accept the proffer of the counsel for the Pennsylvania Development Company, and that he, counsel for the defendants may have a like opportunity.

Mr. Medler:

I object.

Sustained.

The defendants except to the ruling of the court upon his offer to prove last above stated.

The Court:

These papers I would be glad to examine that package upon the offer of the counsel for the Pennsylvania Development Company. (The papers are here handed *for* the Court to inspection.)

The Court:

The Court inspected the memorandum of the documents included in the sealed package under the escrow agreement which provides that this package except by the written consent of both these parties to the agreement, and being of the opinion that the documents enclosed have no relation whatever to the subject matter of this suit, and do not tend to throw any light or give the court any information upon the matter in issue, I, therefore, hold that these documents are wholly immaterial and are not competent evidence in this case, and the matter being a private transaction in escrow the court will decline to demand the production of these papers or interfere with the escrow in any way.

The defendants except to the ruling of the court as to his explanation for the exclusion of the documents, and on the

further ground that it appears from the Court's statement that he bases his rulings upon some memorandum on the back of the documents, and not from an inspection of the documents themselves.

Q. Would you consent if Mr. Bergere consent?

The plaintiffs object to allowing these documents to be opened, and object to the taking proof as to this escrow and contract between these parties.

A. I would object to their being opened.

RUFUS J. PALEN, sworn on the part of the defendants, testified upon examination by Mr. A. B. Renehan, as follows:

Q. State your name and business.

A. Rufus J. Palen, president of the First National Bank of Santa Fe.

Q. Are you the custodian referred to in the documents about which the preceding witness was interrogated?

A. The bank has the papers.

Q. The bank of which you are the president? The First National Bank of Santa Fe?

A. Yes, sir.

Q. Have you those papers with you in the court?

A. Yes, sir.

Q. Will you produce them?

Counsel for the Pennsylvania Development Company objects to the introduction and production of these documents for the same reason as stated in the objections to the question bearing upon the testimony of Mr. W. S. Hopewell.

The plaintiffs make the same objections.

Sustained. Exception.

The defendants offer to prove by this witness the same facts set out in their offer to prove by the witness Hopewell, and ask permission of the court to make that proof.

Counsel for the Pennsylvania Development Company objects to the offer for the same reason given above.

Sustained. Exception.

A. M. BERGERE, sworn on the part of the defendants, testified upon direct examination by Mr. A. B. Renehan, as follows:

Q. You are the guardian of Adelina Otero, Eduardo Otero and Manuel B. Otero, and represent them as such, do you not?

A. I do.

Q. You are one of the parties to the escrow agreement about which the preceding witnesses, Major R. J. Palen and W. S. Hopewell were interrogated?

A. I am.

Q. That agreement in escrow it appears contains the statement that it may be opened by agreement of yourself and Mr. Hopewell in writing; do you consent to the opening of those papers?

The plaintiff objects to the question.

A. I would not consent.

Q. You would not consent?

A. No, sir.

Q. Those papers relate to the Estancia and Berendo Springs land do they not? and also to small holding claims in evidence in this case?

The plaintiffs object to the question as being immaterial to the issue in the case on trial.

Sustained.

Counsel for the defendants, under the ruling of the court based upon the endorsement on the back of this escrow agreement that the papers could not be opened except by agreement of the parties, contends that as the best evidence is not producable under that ruling, he be authorized and permitted to offer secondary evidence as to the contents of the papers and asks permission to do so.

The plaintiffs object on the ground that it is secondary evidence and also is immaterial.

The Court:

The court having made an inspection of the memorandum as to the documents enclosed in the escrow agreement in the envelope, and being of the opinion that they are immaterial therefore and not competent evidence in this case and not tending to throw any light upon the issues in this case, the objec-

tions to the offer of secondary evidence of the contents of the documents if they are produced, will be sustained.

The defendants except to the ruling of the court in excluding secondary evidence of the contents of these papers, and also except to the ruling of the court on the ground that the papers themselves are the best evidence of their contents, if the court would permit them to be opened, and their contents cannot be determined from an inspection of the memorandum of the documents enclosed in the envelope.

Counsel for the plaintiffs states that the inspection made by the court was upon the offer of the counsel for the defendants and the counsel for the Pennsylvania Development Company, and that the memorandum was a portion of the papers, and that the court was, on the offer made, entitled to be guided by the documents in the offer, the memorandum being a portion of and description of the papers.

The Court:

The memorandum states what the papers enclosed are. Counsel for the defendants makes the further objection on the ground that the ruling of the court is in effect, has the effect of the suppression of evidence in this case from the point of view of counsel for the defendants.

Q. Mr. Bergere, will you state how and from whom and in what manner you derived title to the lands embraced in this escrow agreement?

The plaintiffs object to the question as not being the best evidence and as immaterial.

Sustained. Exception.

Counsel for the defendants now offers to prove by the witness Bergere who has been shown to be the husband of the plaintiff, Eloisa Luna de Bergere and the step-father and guardian of the three minor children, that whatever title he had to the lands embraced within the escrow agreement he acquired by mesne conveyance from the plaintiffs in the small holding claims in evidence, and are based upon the Bartolome Baca grant rejected, the major portion of which was given to the ancestor and predecessor in the title of the plaintiffs herein.

Manuel Antonio Otero, by virtue of a deed from Jesus Maria Sena y Baca to Manuel Antonio Otero dated July 17th, 1878, which is in evidence and the deed from Manuel Antonio Otero to Jesus Maria Sena y Baca, dated June 22, 1878, which is in evidence both on the part of the defendants and on the part of the plaintiffs in this case.

The plaintiffs object to the offer to prove the stated facts and in bulk as stated and insist upon the proof being offered by questions asked of the witnesses.

Sustained. Exception.

Q. Do you decline to state, Mr. Bergere, the source of whatever title you may have in the lands embraced in this escrow agreement?

A. I do.

Q. From whom and how did you derive whatever title you have which is the subject of this escrow agreement?

The plaintiffs object to the question as not being the best evidence.

Sustained.

Exceptions to the ruling of the Court on the ground that while this is not the best evidence and the best evidence is included in the escrow agreement, which is excluded from inspection, he has no other evidence which he can produce except the oral testimony of this witness and the two preceding witnesses, and asks leave to interrogate the witnesses on these lines.

Counsel for the plaintiff calls attention to the fact that the best evidence is the absence of the inaccessibility of the originals is the record of any real estate titles.

Sustained. Exception.

Q. Have you got the original deeds upon which whatever title you have to this land is based, or are they in your custody or control?

A. I believe they are in the files of the clerk of the court, of the district court, all the deeds that I had.

Q. I refer to the lands within the Bartolome Baca grant which is the subject of the small holding which are in evidence.

The plaintiffs object to the question as assuming a state of

facts not proven in the Bartolome Baca grant whatever it may be as the subject of any alleged small holding claims, such assumption being contrary to law and contrary to proven facts in this case, the Bartolome Baca grant whatever it was has ceased to exist.

Q. The Bartolome Baca grant, I have used the expression "Bartolome Baca" grant as a term of description for a tract of land which was claimed as a grant under that name.

The plaintiffs object to the question now as not being easily understood, and ask that it be reframed.

A. I do not understand the question.

Q. Repeat the question.

A. I do not know what you are referring to.

Q. That land mentioned in the escrow agreement.

A. I would not know how to answer that question.

Q. Why not?

A. Because I do not understand it. I do not understand what deeds you are trying to get at.

Q. Then state generally upon what you rely for the lands which are the subject of this escrow agreement.

The plaintiffs object to this question as immaterial to this inquiry.

Sustained. Exception.

Q. You have acquired title or claim to have acquired title to the small holding claims which I have mentioned; now state is it not true that you base that claim of title upon these small holdings and certain deeds from persons claiming interests by reason of being tenants in common under the Bartolome Baca grant rejected of the small holdings and who claim that you and the plaintiffs whom you represent in this case were tenants in common or trustee for their benefit as to that land.

The plaintiffs object to the question as containing inference repugnant to the law, as seeking to cause this witness to impeach in this proceeding a title under certain small holdings claims not involved in this proceeding, as immaterial to this inquiry and as seeking to prove that the small holding claims mentioned which are necessarily based on possessory right-

are not legally founded on such possessory rights; and as undertaking to tie small holding claims to titles shown by the question itself to have been extinguished also as seeking to constitute a collateral attack to pending small holding claims.

Sustained Exception.

The defendants offer to prove by this witness the same facts that we offer to prove by the witnesses Hopewell and Palen, and we also offer to prove by him the particular facts that he purchased from the plaintiff in this case whatever interests they might have had in the small holdings in question, and that thereupon he made a contract to sell the same land to W. S. Hopewell, and we desire to say to the court that that small holding rights, if any there were of any of the plaintiffs, are the rights if any accruing under the small holdings in evidence of Jesus Maria Sena y Baca to the Bartolome Baca grant and that thereby it will appear that the plaintiff seeks to claim the ownership of all possessory rights under the Bartolome Baca grant that Jesus Maria Sena y Baca had without tendering back to Jesus Maria Sena y Baca or his heirs, any rights in the Bartolome Baca grant.

The plaintiffs object to the method of counsel for defendants in offering proof and in offering recital of what he has a right to prove by the witness, and insist that the orderly and proper method of proof is to make interrogations calling for the evidence desired.

Sustained. Exception.

Defendants ask if it is understood that the rule is that it is not proper for counsel to make offers of proof after interrogating the witness.

The Court:

I understand that it is the proper method of proof in a case: you see it is within the power of counsel to make offers of proof that they could not under any circumstances prove; it is an inconclusive thing and a method by which justice might be very easily defeated. Counsel might offer to prove a thing that did not exist, and therefore I deem it an improper method of getting proof.

Q. You have sold whatever rights you had or had acquired under these small holdings by means of this escrow agreement to W. S. Hopewell for the sum of twenty thousand

The plaintiffs objected to the question as immaterial.

Sustained. Exception.

Q. You have received of that purchase price $10,800.00 have you not?

Plaintiffs object to the question as being immaterial.

Sustained. Exception."

ASSIGNMENTS OF ERROR.

Now comes the appellants and assign error in the said cause as follows, to-wit:

1. The lower court erroneously excluded the evidence demanded of the witnesses Hopewell, Bergere and Palen concerning certain deeds in escrow because such exclusion was contrary to the rules of evidence and because the evidence so sought was material at least to show that the plaintiffs and their privies interpreted the so-called contract of June 22, 1878, and the deed of July 17th, 1878, as constituting executed sales and contracts. (See Findings 20 and 21.)

2. The lower court erred in overruling the offers to *prove* by the defendants below, in connection with the said deeds in escrow and the excluded evidence asked of the said witnesses, Hopewell, Bergere and Palen, because such exclusion was contrary to the rules of evidence and because the evidence so sought was material at least to show that the plaintiffs and their privies interpreted the so-called contract of June 22, 1878, and the deed of July 17, 1878, as constituting executed sales and contracts. (See findings 20 and 21 and evidence *supra*.)

3. The court erred in holding that the agreement of June 22, 1878, was executory and not executed; for it should have held such agreement, according to its *face* and according to the evidence, as executed.

4. The court erred in holding against the defendants' plea of the statute of limitations, as giving title and right of possession, if the said contract of June 22, 1878, was originally merely executory, because such holding was contrary to the evidence and contrary to the law.

5. The court erred in not holding good and well taken the motion made by the defendants at the close of the the plaintiffs' cause in chief, to-wit, to find the issues in the defendants' favor, on the grounds, among others, (*a*) that no demand of possession or notice to quit had ever been made or given, and, (*b*) that there was an exception and exclusion of certain lands

from the deed by Miguel E. Pino to Manuel Antonio Otero, which is the foundation deed in the case, which excepted lands have not been excluded in the proofs from the lands in issue and not identified by any evidence, so that it does not appear but that the excepted lands are the real lands in issue, since the Galisteo ranch or grant was cut down by the Court of Private Land Claims from 24,00 to 317 acres.

6. The court erred finally in not dismissing the complaint for failure of the plaintiffs, during the whole case, to show that the lands sued for were the lands conveyed by Miguel E. Pino, to Manuel Antonio Otero and not the lands excluded from such sale and conveyance.

7. The court erred in not holding that the plaintiffs were estopped by laches from ascertaining title to the Galisteo ranch or any part of it as against the defendants, having stood mute since September 7, 1881, when the Baca grant was rejected until April 3, 1901, when their complaint here was filed.

8. The court erred in not holding that there was a presumption of deed given on account of the lapse of time and acts done, even if the so-called contract of June 22, 1878, was at its date an executory contract.

9. The court erred in entering judgment in favor of the plaintiffs for all the reasons herein stated, and in denying the defendants' motion for findings and in overruling defendants' objections to the court's findings.

BRIEF OF THE ARGUMENT.

I.

THE EVIDENCE OF HOPEWELL, BERGERE AND PALEN SHOULD HAVE BEEN ADMITTED AT LEAST TO SHOW THAT THE PLAINTIFFS AND THEIR PRIVIES INTERPRETED THE SO-CALLED CONTRACT OF JUNE 22, 1878, AND THE DEED OF JULY 17, 1878, AS CONSTITUTING EXECUTED SALES AND CONTRACTS.

The action of the lower court in respect to this tendered evidence and the offers to prove it was astounding, for the court refused to receive the best evidence, and rejected, secondary, because it was not primary. There was a reciprocal duty resting upon each party to return what he got, if the contract was executory. The rights of small holding, under sections 16 and 17 of the Act establishing the Court of Private Land Claims, result from actual, bona fide, continuous, adverse possession. The several plaintiffs claimed this sort of possession, which rested, in part at least, upon the deed from Sena y Baca. That deed was an evidence of the bona fides of the possession (R. pp. 68 to 75). The materiality or immateriality of that evidence could only be determined by its inspection, but inspection was refused. The court looked at the memorandum upon the envelope and determined from it the value of the contents. Counsel for the defendants, nor the court, saw what was inside.

II.

THE AGREEMENT OF JUNE 22, 1878, WAS EXECUTED, ACCORDING TO ITS FACE AND ACCORDING TO THE EVIDENCE, AND NOT EXECUTORY.

It contains words of grant and conveyance, and a promise to execute and deliver deeds when the Bartolome Baca grant "shall be adjudicated and approved by the Surveyor-General,"

and further directs that the grantees take possession "until meanwhile the proper documents may be executed." (R. 57.) The plain meaning is that the grantor had sold and conveyed the premises, but would not deliver "a proper deed" unless the Bartolome Baca grant were recommended for confirmation by the Surveyor-General. It was a sale and transfer without formal writing. This theory is sustained by the inaction of Manuel Antonio Otero and his descendants from the time when the Surveyor-General disapproved the grant, September 7, 1881, until this suit was instituted, the sale and transfer of the Galisteo grant meanwhile to several grantees, the institution of suit by each party for the confirmation of the tract which he obtained in the trade or exchange. Thus is shown again the importance of the excluded evidence. It is true that the court calls the agreement executory, but the conclusion is based upon no evidence, except the form of the document itself, as the lower court read it, to-wit, "for the deeding of the Galisteo Ranch to Sena y Baca upon the happening only of a certain contingency, which has been extinguished." (R. p. 59, 12th finding.) But that construction does violence to the language of the instrument, which in itself declares the sale made, and only withholds proper documents until the happening of a contingency. There was an exchange of one grant for the other. (20th finding, R. p. 61.)

III.

THE STATUTE OF LIMITATIONS WAS A COMPLETE DEFENSE EVEN IF THE SAID CONTRACT WAS ORIGINALLY EXECUTORY.

Lapse of time not only bars the remedy of the original owner, but extinguishes his right and vests a complete title in the adverse holder.

Maxwell Land Grant Co., vs. Dawson, 151 U. S. (L. Ed.).

"When one claims property as owner and exercises acts of ownership over it unquestioned, and without objection by

those most deeply interested, until the statute of limitations has run, the presumption is that this title is correctly stated by him."

Teall vs. Schroeder, 158 U. S. (L. Ed.) 941.

"Independently of positive or statute law the possession supposes an acquiescence in all persons claiming an adverse title; and upon this acquiescence is founded the presumption of existence of some substantial reason—although, perhaps not known—for which the claim of an adverse interest was forborne."

Sharon vs. Tucker, 145 U. S. (L. Ed. 585.

There need not be a fence, a building, or other improvement made. (Ewing vs. Burnet, 11 Pet. 41; Ellicott vs. Pearl, 10 Pet. 412; Coal Co. vs. Doran, 142 U. S. (L. Ed.), 1063; Smith vs Gale, 144 U. S. (L. Ed.) 521.

As between landlord and tenant, there must be a clear, positive and continued disclaimer and disavowal of the title, and an assertion of an adverse right brought home to the party. (Zeller's lessee, vs. Eckert, 4 How. 296.)

What is meant by the expression "brought home" is shown in the same case. Thus, when the possession becomes tortious and wrongful by the disloyal acts of the tenant, it must be open, continued and notorious, so as to preclude all doubt as to the character of the holding, or want of knowledge on the part of the owner. If he then neglects to enforce his rights, the loss is attributable to his own laches and not to the law. (Willison vs. Watkins, 3 Pet. 42; Bradstreet vs. Huntington, 5 Pet. 429; McCloskey vs. Bar, 42 Fed., 615; 1 Encyc. of Law, 2nd Ed., 803, 805.)

In Willison vs. Watkins, *supra*, in reference to landlord and tenant, which is a similar question, this court used the following striking language: "If the plaintiff can recover without any other evidence of title that a tenancy existing thirty years before this suit was brought, it must be conceded that no length of time, no disclaimer of tenancy by tenant, and no implied acquiescence by landlord can protect a possession origin-

ally acquired under such tenure. * * * Had there been a formal lease for a term not expired, the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice before ejectment. The landlord's action would be as against a trespasser as much as if no relation has ever existed between them. * * * Having thus a right to consider the lessee as a wrong-doer, holding adversely, we think that under the circumstances of this case, the lessee was bound so to do. * * * If no length of time would protect a possession originally acquired under a lease, it would be productive of evils, truly alarming."

Furthermore, a presumption of grant and deed arises from lapse of time. This court in Fletcher vs. Fuller, 120 U. S., say: "In such cases, 'presumptions' as said by Sir William Grant, 'do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed * * * merely for the purpose and from the principle of quieting the possession. There is as much occasion for presuming conveyances of legal estates * * *. The owners of property, especially if it be valuable and available do not often allow it to remain in the quiet and unquestioned enjoyment of others. * * * When, therefore, possession and use are long continued, they create a presumption of lawful origin, that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, *that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance*, which the parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. (U. S. vs. Chavez, 175 U. S., 520; Van Gunden vs. Coal Co., 52 Fed. 856; Fuller vs. Fletcher, 44 Fed., 37; U. S. vs. Devereaux, 90 Fed., 187; Zeller's lessee vs. Eckert, 4 How., 297.)

Possession for years under a contract of sale, justifies the presumption of a deed. (Woodson vs. Scott, 1 Dana 472;

Downing vs. Ford, 9 Dana, 373; Brock vs. Savage, 47 Pa St. 83.)

There is a distinction between the statute of limitations and the presumption of deed by lapse of time, but it is in the form and not in the effect. Both processes have for object the pacification of title. One finding or conclusion, whichever it may be called, the 13th, (R. p. 59) is enough in itself to bring the appellants within either rule, for twenty years are covered by the statement. There are findings or conclusions seemingly contradictory, such as the 7th, but an analysis shows that the antagonism is more apparent than real, for throughout the findings the recitation of facts shows that there is nothing from which to determine amity of possession as against hostility. It is assumed that where finding has been confounded with conclusion, the one of fact and the other of law, if the facts do not support the conclusion the latter must give way on appeal to a rightful determination. So, where the drafting of the findings of fact and conclusions of law are in due form, if the conclusion is not supported by the finding, the conclusion will be set aside. This is elementary. The New Mexico Supreme Court, in the 5th finding, (R. p. 58) declares that the acts of the appellants and their grantors were indicative of ownership, but consistent with subordination. That is neither finding nor conclusion. In the 7th, it is declared that there were no acts of hostile or adverse possession, "except" a number of adequate hostilities, and the capsheaf is found in the 13th (R. p. 59), to say nothing of the 4th and 6th on page 58.

IV.

THE STATUTE OF LIMITATIONS WAS SET IN MOTION SEPTEMBER 7, 1881, FOR THEN OTERO'S RIGHT OF RE-ENTRY RIPENED, IF HE EVER HAD IT.

Otero was to execute and deliver the deeds of conveyance as soon as the Surveyor-General adjudicated and approved the Bartolome Baca grant. That officer had no power of ap-

proval; his was the duty to recommend for confirmation or rejection a grant presented for his consideration. The time selected by the contracting parties was the date of the Surveyor-General's act. If that officer recommended the grant for confirmation, Sena y Baca would thereupon become entitled to more formal deed, according to the appellants' contention; but if he recommended the rejection of that grant, then either he lost the right to more formal deed, or it became his obligation to yield up the property, if he were vendee upon a contingency. The appellants have asserted their theory that their predecessor in entitle would receive no better evidence of his ownership of the Galisteo grant than the contract unless the Bartolome Baca grant prevailed, where? not before Congress, not before the Court of Private Land Claims, which did not exist, but before the Surveyor-General. The parties fixed their own time by reference to a happening. The courts will not make a contract for them, or modify one which they made.

A cause of action accrues when the aggrieved party has a right to apply to the proper tribunal for relief, when the plaintiff could first have brought his action, at which time the statute begins to run. (25 Cyc. 1065, 1066, 1067.) And in this case the right to sue accrued when Otero, his heirs or assigns, had the right of re-entry, if the contract was not executed, which was September 7, 1881, or, in other words, when his cause of action accrued. (Mahoning County vs. Young, 16 U. S. App., 265; 6 ney of Law, p. 502, Note 9.) The appellees did not give notice to quit, thus assuming that the holding over by Sena y Baca and his assigns was tortious, *ipso facto*, but they refer the time when this tortious holding began to the date of the decision of the Supreme Court of the United States in 1897. But they had no authority for this assumption. The contract fixed its own date, which, by the event, became September 7, 1881. On the other hand, if the holding over was not wrongful, notice to quit was a prerequisite, but it was not given. As these two propositions make a dilemma it is not improper to treat that assignment of error which relates to the notice to vacate under this head, except for the inconvenience which might result.

V.

DEMANDS OF POSSESSION OR NOTICE TO QUIT WAS A PREREQUISITE TO SUIT.

"In an executory contract of purchase, the possession is originally rightful, and it may be that until the party in posession is called upon to restore it, he cannot be ejected without a demand or notice to quit." (Gregg vs. Von Phul, 1 Wal., 282; Costigan vs. Wood, 5 Cranch (CC), 507; Jones vs. Temple, 87 Va., 210; Williamson vs. Paxton, 18 Gratt. 475; Stackhouse vs. Doe, 5 Blackf., 570; Getty vs. Poters, 10 L. R. A., 465).

But on the other hand, Gregg vs. Von Phul, SUPRA, in immediate connection with the language already quoted from that decision, contains the following: "But the vendee can forfeit his right of possession, and if he fails to comply with the terms of sale, his possession afterward is tortious, and there is an immediate right of action againt him." The appellees may take their choice.

One of the conditions or terms of the sale of the Galisteo ranch was the confirmation of the Bartolome Baca grant. This was the price to be paid for a deed, if the contract was executory. The price was not paid. However, if the defendants were not called upon to render up the possession when the consideration failed, then demand or notice to quit was requisite; so, where the vendee is also tenant, as here, under one construction, by the terms of the contract. (Jackson vs. Niven, 10 Johns, 335).

Again, "when the purchaser of land has made default in the payment of money under an executory contract, no notice to quit is necessary, nor any demand of the amount due, of the possession, or tender of a deed, before bringing action of ejectment." (Hotaling vs. Hotaling, 47 Barb, 167.)

VI.

THE COURT SHOULD HAVE SUSTAINED THE DEFENDANTS' MOTION MADE AT THE CLOSE OF THE PLAINTIFFS' CASE IN CHIEF TO DISMISS THE CAUSE BECAUSE NO NOTICE TO QUIT HAD BEEN GIVEN, AND BECAUSE IT WAS NOT SHOWN THAT THE EXCEPTIONS AND RESERVATIONS FROM THE DEED BY MIGUEL E. PINO TO MANUEL ANTONIO OTERO WERE NOT THE VERY LANDS CLAIMED BY THE DEFENDANTS OR SOMEBODY ELSE.

The two points aforesaid are found in the record at pages 68 and 77. The first point has been covered elsewhere. The deed in question has already been referred to. (R. p. 60).

In ejectment, the burden of proof is upon the plaintiffs to show their title to the identical lands claimed by the defendants,, and "it was incumbent upon the plaintiffs to show that the land they sued to recover had not been previously conveyed, and hence that they had taken title thereto under the deed." (Maxwell Land Grant Co., vs. Dawson, 151 U. S., (L. ed.) 285.

In the state of the proofs, can it be said that the Galisteo grant, as reduced, included any other land than the portions excepted by Pino in his said deed. Finding 1 (R. p. 57) shows that Manuel Antonio Otero only held a part of the Galisteo ranch, and (finding 15, R. p. 60) shows that the title and claim of Miguel E. Pino, from whom Manuel Antonio Otero deraigned title to the Galisteo grant, contained reservations and exceptions of several tracts, which, (finding 16, R. p. 61) the plaintiffs have not excluded from the land demanded in suit, and they have not shown that the Galisteo grant or ranch as finally confirmed is not identical with such reservations and exceptions, or within them.

The Maxwell case, SUPRA, covers the entire ground of the necessities in ejectment laid upon the plaintiffs with respect to such reservations. There it is said in part: "The question was

whether the plaintiff was bound to show that the lands claimed by him in this suit had not theretofore been conveyed, or whether the burden was upon the defendant to show that they had been so conveyed. * * * Bearing in mind that the burden was upon the plaintiff to show its title to the identical land claimed by the defendant, it is manifest that, as the plaintiff did not take title to 15,000 acres * * * by reason of the fact that its grantors had already conveyed this amount of land, it was incumbent upon it to show that the lands it sued to recover had not been previously conveyed, and, hence, that it had taken title to it under its deeds * * * If, for example, a person should convey to another a block of land, excepting therefrom a certain lot previously conveyed, to sustain ejectment for any particular lot, it would be necessary for the plaintiff to show that it was not the lot which had been previously conveyed."

The precise question is found in Hawkins vs. Barney, 5 Pet. 457, quoted in the Maxwell case, and quoting with apparent approval Saylor vs. Taylor, 3 A. K. Marsh. 18, Madison vs. Owens, Guthrie vs. Lewis.

VII.

THE PLAINTIFFS ARE ESTOPPED BY LACHES TO HAVE OR RECOVER THE SAID PREMISES.

The laches consist of the indifference shown by the plaintiffs' ancestors and themselves, which induced the improving at cost and the bargaining and selling of the Galisteo ranch. Even in ejectment laches will bar the plaintiff. (Kirk vs. Hamilton, 102 U. S. 78, Naddo vs. Bardon, 51 Fed. 492; Dickerson vs. Colgrove, 100 U. S., 578).

VIII.

THE OPINION OF THE NEW MEXICO SUPREME COURT INVITES REVIEW IN SOME PARTICULARS.

First. The court assumes (R. p. 83) that the action taken by the Surveyor-General recommending the approval of a grant is its confirmation, which involves an entirely different idea, because then that official's act would be a finality, which was not contemplated by the parties, but only the exercise of such powers as the Surveyor General possessed, to-wit, to ascertain the nature of all private land claims and to "make a full report * * * with his decision as to the validity or invalidity of each 'private land claim.'" (Sec. 8, p. 309, 10 Stats.).

Second. The fact that the contract of June 22, 1878, was signed by both parties does not militate against the contention that it was a deed, since one of them dealt with respect to the Galisteo ranch and the other with respect to the Bartolome Baca grant.

Third. The acknowledgment to a deed is no part of the instrument. It is but a means of proof. Besides, the same statute from which the court quoted contains this section: "Sec. 3960. None of said writings shall be valid, except to the parties interested and those who have actual notice of the same, until it shall be deposited in the office of the clerk to be registered." (C. L. 1897.) Indeed, the argument otherwise wastes away, for, by the same law, a contract affecting real estate should just as well be acknowledged.

Fourth. The interpolation of the Supreme Court of the United States would indicate that our court misconceived the argument. The contracting parties did not contemplate the Supreme Court of the United States, nor any other court; they had only the Surveyor-General in mind.

Fifth. The evidence did not disclose that Sena y Baca designed his title only from Manuel Antonio Otero by virtue of the executory contract, and thus recognized the title of the vendors to the premises, nor is it true that no claim was made by

the defendants that their title arose from any other source. The evidence being lacking no discussion of this proposition can be entertained, except to call attention to the findings and conclusions as a whole, the reference to reservations and exceptions, the reduction of the Galisteo grant from 24,000 to 317 acres, and the statement that Manuel Antonio Otero on June 22, 1878, only held part of the Galisteo grant.

Sixth. The rule is overstated concerning the nature of the possession of a vendee under an executory contract. The authorities have been discussed elsewhere in this brief.

Seventh. The New Mexico Supreme Court attaches some importance to the fact that the Galisteo ranch was conveyed to Rumberg by a quitclaim deed, but this court has considered the virtue of the quitclaim deed on sundry occasions and not to the dishonor of that form of conveyance. The inference with reference to the delivery of the contract is erroneous. The proper inference is that it was passed down just as a muniment of title, according to the Mexican and some other customs.

Wherefore, it is respectfully submitted that the said cause should be reversed and remanded with instructions to enter judgment in favor of the appellants.

A. B. RENEHAN,
Attorney for Appellants.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1912.

LUCIANO CHAVEZ, ET AL., *Appellants*,
vs. No. 5
ELOISA LUNA DE BERGERE, ET AL., *Appellees*.

Appeal From the Supreme Court of the Territory of New Mexico.

BRIEF OF APPELLEES.

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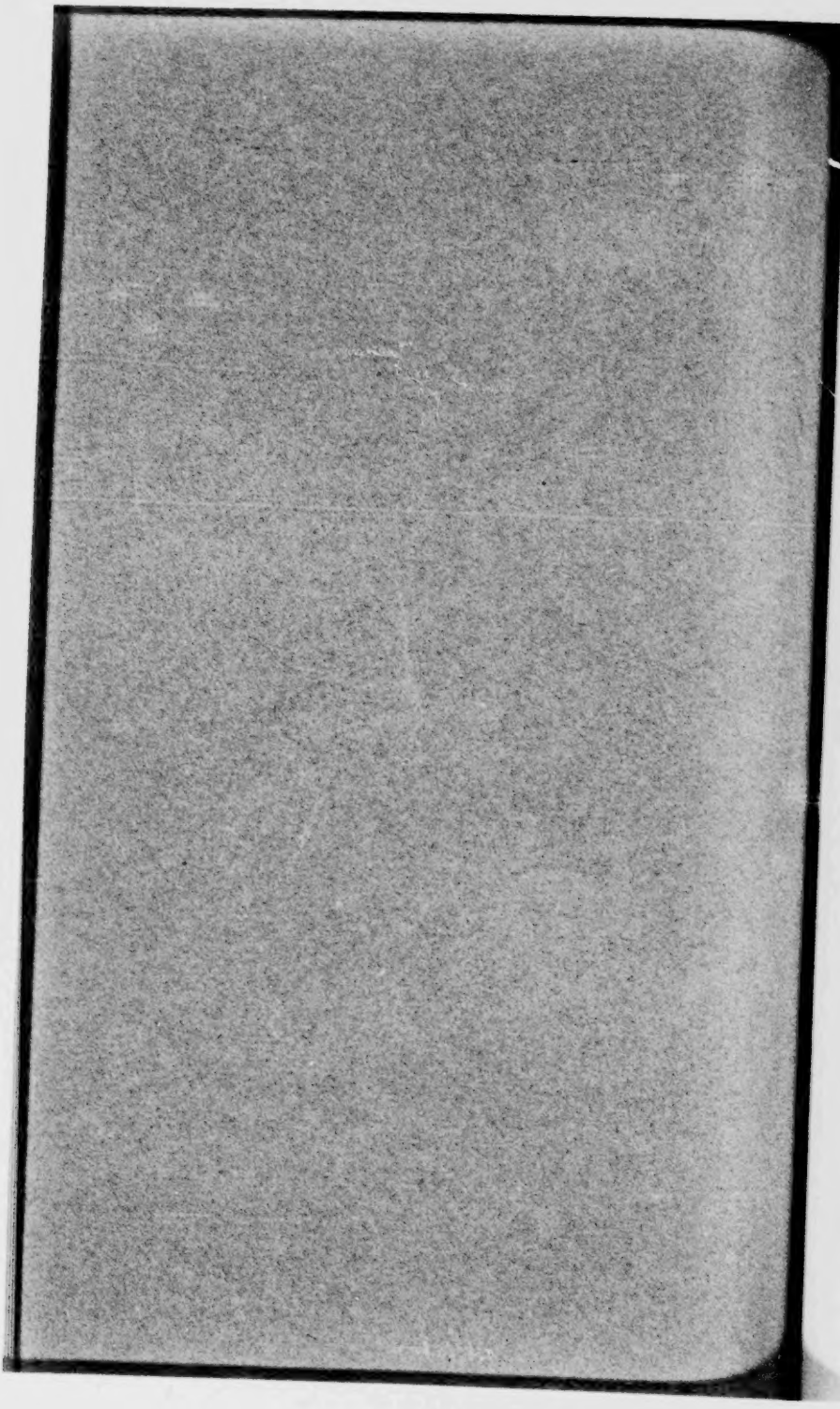

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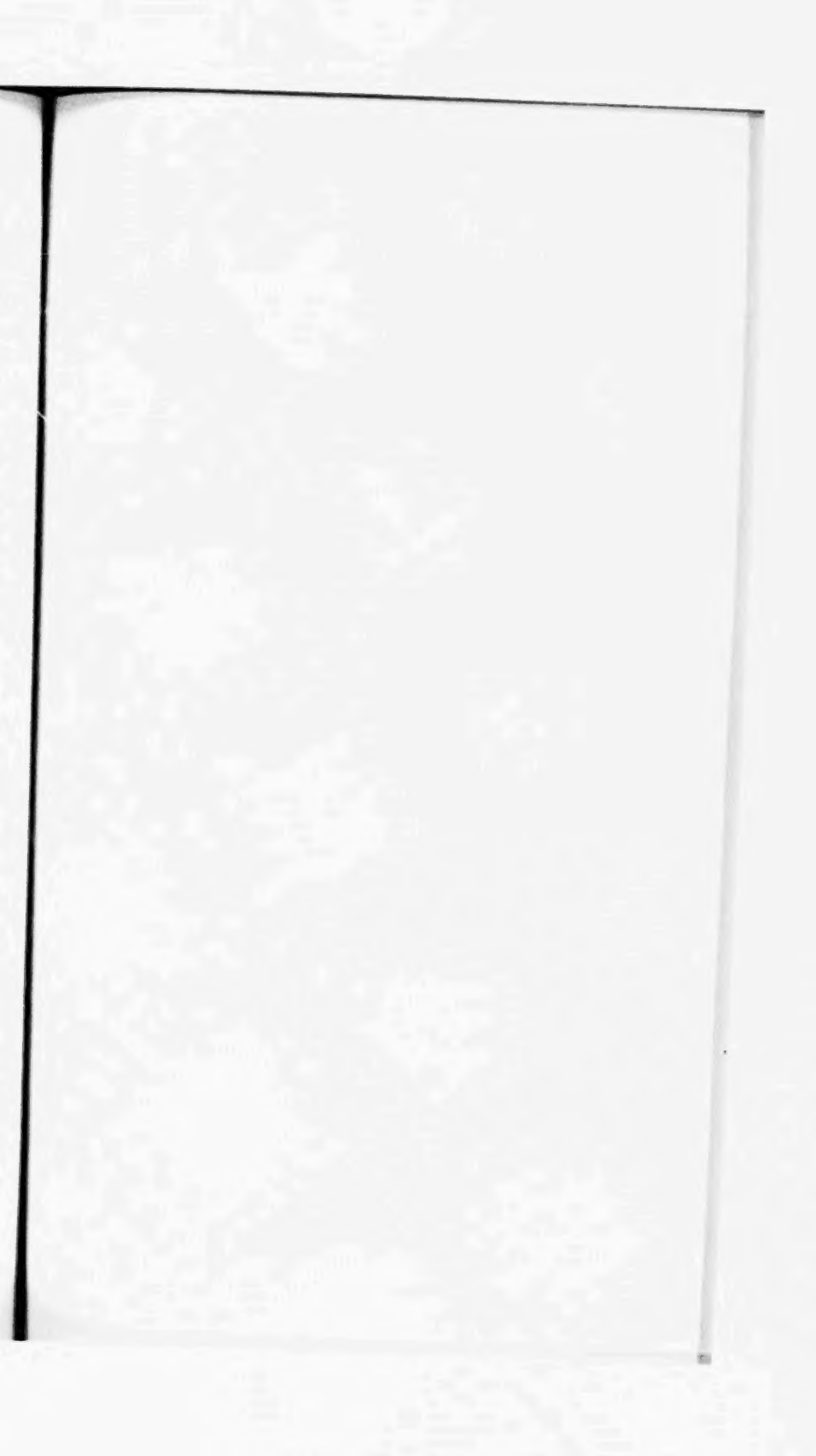

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1912.

LUCIANO CHAVEZ, ET AL., *Appellants*,
vs. No. 43.
ELOISA LUNA DE BERGERE, ET AL., *Appellees*.

Appeal From the Supreme Court of the Territory of New Mexico.

BRIEF OF APPELLEES.

We have not been favored with a copy of any brief for appellants in this cause, and are therefore under the necessity of preparing this brief without other guidance as to the points that may be raised, than such as is furnished by the assignments of error appearing in the transcript at marginal pages 137 and 138.

The first and second assignments of error relate to the exclusion of certain offered evidence, and will be found discussed in this brief under point No. XI.

The third assignment of error, concerning the nature of the agreement of June 22, 1878, together with the fourth assignment of error on the same subject, must be discussed under certain

subdivisions of the questions thereby raised, hereinafter set out in points Nos. I, II, III, IV, V, VI, VII, IX, X.

The fifth assignment of error, as to Point A therein made, that no notice to quit preceded the suit herein, will be discussed under point No. VIII, and as to the proposition B, made therein concerning certain lands excluded from a deed far back of the agreement of 1878, will be discussed under point No. XII.

The sixth, seventh, eighth and ninth assignments of error, being general charges of a misconception of the law by the Supreme Court of New Mexico, are embraced in the general discussion of this case hereinabove classified under points Nos. I to X, inclusive.

The arrangement of discussion made by the assignments of error being therefore illogical and indirect, we beg the indulgence of this Honorable Court in approaching the case under our own classification of the points involved, as above suggested.

GENERAL STATEMENT OF THE CASE.

This is an action of ejectment brought by appellees as the plaintiffs below, who hold title to the premises in question both by inheritance and by a deed from another of the heirs. The property in question is the tract known as the "Rancho de Galisteo," the "Loya Ranch" or the "Miguel E. Pino Ranch," being different names for the same place.

This ranch existed as the unconfirmed subject

of private ownership, derived from the Mexican Government, long prior to 1865, and in 1865 the property, with many old "*hijuelas*" or certificates of allotments given by the *alcaldes*, passed into the possession and ownership of Manuel Antonio Otero, through whom all parties hereto claim title.

Manuel Antonio Otero, according to the contention of both plaintiffs and defendants, held the title up to the year 1878, and in that year on the 22d day of June, the document was made and executed which lies at the foundation of all the controversy in this case. This document was an agreement, or instrument in writing, executed in duplicate between Manuel Antonio Otero and Jesus M. Sena y Baca, and by virtue of this instrument it appears that Sena y Baca went into possession of the ranch. It is claimed by the defendants below, appellants here, that this writing was a transfer of title to Sena y Baca from Otero; on the other hand it is claimed by plaintiffs that it was not such a transfer of title, but was an executory contract of sale. In passing it may be cited as somewhat significant that Manuel Antonio Otero did not deliver to Sena y Baca the old "*hijuelas*" nor the various deeds making up his chain of title to this property; all of which remained in the possession of Otero and his heirs, and are produced in Court by the witness for plaintiffs, A. M. Bergere, who is guardian of the three minor heirs of Otero. The Court takes judicial notice of the customs of the Mexican people, inheriting Mexican ideas of the laws of trans-

fer of real estate; and the fact that Otero did not turn over the deeds and muniments of title to his alleged vendee, Sena y Baca, is not unimportant in revealing the nature of the transaction between them.

However, as stated, the main issue of the case rests primarily in the interpretation of that transaction, as the same is made manifest by the two duplicates of the agreements, called "Plaintiff's Exhibit 24" and "Defendants' Exhibit 5," (Tr. marg. page 97). There were apparently the duplicates of the agreement whereby Otero turned over to Sena y Baca the ranch in question.

The defense in this case admits the common source of title in Manuel Antonio Otero and undertakes to extinguish that title and to vest the same in the defendants by operation of the Statute of Limitations. From the defendants' argument in the Court below, in the case, it is impossibe to know just what theory is actually presented to the Court by them as the initial point of the alleged running of the Statute of Limitations in favor of defendants. It seems to be insisted in the first place that the agreement of 1878 was an absolute deed *in praesenti*, and that the vendee taking possession thereunder became a holder hostile to the vendor and that the Statute of Limitations started to run in his favor immediately upon the making of this agreement. It may be that defendants do not insist upon that position, but will say that by reason of the rejection of the Baca Grant in 1881, Otero became entitled to the right of entry again in the Galisteo

Ranch, and that from that time on the possession of Sena y Baca, the predecessor of defendants, became hostile. It may be that defendants will not insist, however, upon even that, but will come on further to the year 1885, when Sena y Baca died and his property rights descended to his widow and heir at law, Agapita Ortiz de Sena. Plaintiffs, however, insist that the *original character of the possession taken by Sena y Baca was that of a tenant and holder in amity with the true title*, and that the possession of such tenant did not become *in any way adverse at any of the periods heretofore mentioned*. The authorities on this point will be hereinafter set forth and the facts of the case proceeded with at present for the full information of the Court.

Mrs. Sena y Baca continued in possession of the property up to July 10, 1888, and on that day she quit-claimed her possessory rights and interests in the property, by deed which significantly refrained from guaranteeing the title and which referred to her *rights of possession*, to one Jesse D. Rumberg, who also placed on record the duplicate of the original agreement of 1878, which had come to him from Mrs. Sena y Baca along with her quit-claim deed, and of which he certainly had notice. Rumberg continued in possession for about one year and on July 18, 1889, in a manner strikingly similar to that of Mrs. Sena y Baca, he quit-claimed the *possessory rights* he might have in this property to Jose de la Chavez, at the same time turning over to Chavez the original agreement of 1878. Chavez therefore, equally with

Rumberg, had absolute notice of the nature of the estate and possessory rights which he was acquiring by virtue of the original agreement. Chavez was the father of the present defendants in the case, and he died about 1891.

The defendants and appellants may perhaps adopt some one of these dates, or the time of recording some one of these papers, as the starting point for the running of the Statute of Limitations. In the absence of any definite selection by them of such date, however, it is incumbent upon us to discuss the case from every possible point of view and from every possible date on which the parties may rely. However, it is earnestly believed that no one of the times yet mentioned and no one of the times set forth in this history of the matter will be found by the Court to possess anything of a nature hostile or adverse to the true title, or sufficiently so to alter an amicable possession entered into and acquired by a tenant, under authority of his land lord or grantor.

In the early '90s, the exact time not being fixed by the defendants in their evidence—and the burden of proof being upon them in such defense as this to fix such exact time—the defendants Chavez made a few substantial improvements upon the property, and in the year 1893, they along with a large number of other claimants, filed in the Court of Private Land Claims a petition, praying the confirmation to them of a large Grant of land which included within its boundaries this Galisteo Ranch. The Grant of which they prayed confirmation was an extensive tract and to sustain it

various instruments were laid before the Land Court, but by the final decree of that Court, rendered in 1895, only the portion included within the Galisteo Ranch, and the title to that portion, were found to be valid against the Government. In the opinion of plaintiffs this assertion of a right to the confirmation of this property was the first public and notorious act by defendants which could in any way be considered to start the running of the Statute of Limitations in thier favor, or to characterize their possession as hostile and adverse. However, even that may be well doubted, for in their petition, as in the nature of all proceedings in the Land Court, the plaintiffs in that case prayed for a confirmation for their benefit as well as for the benefit of all other owners of the property; thereby necessarily admitting and intimating, along with their assertion of title in themselves, that there were other persons interested in the property. However, it is not necessary to make argument on this point, as an adverse possession initiated in 1893 would be utterly unavailing to defendants in this case, which was instituted in 1901.

It is readily apparent that the determination of this case by the Court must first dispose of the propositions raised by the agreement of 1878. Was that agreement a conveyance *in praesenti*, or did it create or was it an executory contract of sale, authorizing the proposed vendee to assume and hold the possession which he thenceforth had?

If this first question be resolved in favor of the plaintiffs, to wit: that the agreement was an exec-

utory contract of sale, then the controversy is brought down to a very narrow issue. As vendee in this contract, Sena y Baca is estopped from denying the title under which he held. This same estoppel applies to his heirs and assigns. The possession taken by him being an amicable possession and one in recognition of the Otero title—so far from being adverse to that title—is a possession by and on behalf of that title, and every year the ranch was held under and in recognition of that agreement, was a possession by Otero and his heirs, through their agents who held for them. Of course an agent may disclaim his agency, a trustee may violate his trust, and a person charged with a duty as a tenant, may repudiate that duty and initiate an adverse holding to himself. But the act that terminates the trust relation must be so unmistakable and unequivocal that there can be no doubt in the Court's mind that the landlord or *cestui que trust*, had absolute or necessary notice of the fact that the relation on which he was relying had been repudiated and rejected.

The authorities are sweeping to this effect, and will be hereinafter set out. But the importance of this primary proposition will be at once seen by the Court. A proper disposition of it removes all necessity for inquiring into any of the disabilities under which the plaintiffs have been during the years that have gone by. The three minor plaintiffs, as shown by the evidence, have been under the disability of infancy during all of the time, up to the commencement of this action. Unless adverse possession was initiated by the predeces-

sors of defendants, against Manuel Antonio Otero in his life time, or against his son Manuel B. Otero during his lifetime—that is to say—unless Sena y Baca initiated adverse possession prior to August 17, 1883, the date of the death of Manuel B. Otero—then any adverse possession initiated after that date would be unavailing against the minor plaintiffs in this case, who remained under disability until the time of the commencement of this action.

As to the plaintiff, Eloisa L. de Bergere, she being the widow of Manuel B. Otero, and one of his heirs, consequently became a *feme sole* on his death, and remained so until 1886, when she again fell under the disability of coverture, which still continues. Therefore, as to her, any adverse possession initiated since 1886 would be unavailing to defendants.

In this connection the Court's attention is called to the fact that defendants may possibly lay claim under two different Statutes of Limitation. The same will be hereinafter more fully referred to; but the vital difference in them is that the sections embraced in the Compiled Laws of New Mexico, of 1897, provide that the statute shall not run against a *feme covert*, and the statute of 1899, omitting that disqualification, contains the additional requirement that the defendants shall have paid the taxes on the property during the running of the statute. It certainly cannot be contended that the defendants have paid the taxes on the property, or that they have even caused the property to be assessed. A great amount of

taxes is still shown to be unpaid and due on the property, by the evidence introduced by the defendants themselves. Therefore, if defendants do not rely on the later Statute of Limitations of 1899, but hold that the former statute vested their pretended rights in them and that though that statute is now amended it remains in existence for the protection of vested rights, in such event it will be necessary for defendants, under that statute and as against the plaintiff, Eloisa L. de Bergere, to show unequivocally that the adverse possession they rely upon commenced before 1886, when this defendant fell under the disability of coverture. Of course, an adverse possession initiated against a party not under disability, continues to run in spite of the disability afterward accruing.

These matters are simply mentioned to show the Court the materiality of first finding in this case the exact status created by the agreement of 1878. If Sena y Baca became thereby a tenant or vendee under an executory contract of sale, the law lays many difficulties in the way of an assertion of change in his holding or possession. It will necessarily be concluded that no such change of possession took place at all events prior to the year 1886.

Plaintiffs' Exhibit 24 and Defendants' Exhibit 5 are duplicates of this agreement of 1878. (Transcript, page 97.) The first was retained by Otero, and the latter by Sena. It went from Sena to his wife, and from her to Rumberg, who put it on record at the same time he recorded Mrs. Sena's

quit claim to him; and was delivered to the Chavezes, and is now produced in Court by them.

ARGUMENT.

I.

AND SO, AS BETWEEN OTERO AND SENA Y BACA, WHAT RELATION DID THEY INTEND, AND WHAT DID THEY ESTABLISH, BY THIS WRITING?

A transfer of title to Sena y Baca, a deed, a conveyance of the fee simple? Or was it a contract placing Sena y Baca in possession and enjoyment, for and under Otero, with an obligation on Otero to transfer him the title at a later day? The latter must surely be concluded from the writing itself, as well as from the circumstances.

"It is sometimes doubtful whether an instrument should operate as a deed, effecting a present transfer of title, or a covenant or agreement to convey a title in the future. And, as in the distinction between deeds and wills, the intention of the parties, particularly the grantor, must always control."

9 Enca. Law, 2 ed., p. 93.

In Williams vs. Payne, 159, U. S., 76, the Court, by Peckham J., says:

"We agree generally that, although there are words of conveyance in *praesenti* in a contract for the purchase and sale of lands, still, if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered as

> agreement to convey and not a conveyance. The whole question is one of intention to be gathered from the instrument itself."

In Jackson vs. Monterief, 5 Wend., 29 (cited with approval by the Supreme Court of the U. S., in 169 U. S., supra), the Court says:

> "In my opinion the contract was an agreement to convey only, and not a conveyance. It contains words of present purchase and sale, but those words must be construed in reference to the whole instrument, and by the concluding paragraph, it is clear that regular conveyances by both parties were contemplated in the consummation of a contract which, until such conveyances should be executed, was inchoate. The possession was changed, but no title passed out of either of the contracting parties. The judge was certainly right, therefore, in deciding that the legal title remained in the lessors. The defendant was a *quasi tenant* at will."

The facts in this case were quite similar to those in the case at bar.

The Court's attention is likewise called to Ogden v. Browne, 33 Pen St. 248, the opinion in which was noticed with approval by the Supreme Court of the U. S., in 169 U. S., 76. Also, the Supreme Court cites us to the language contained in Phillips vs. Swank, 120 Penn. St., 84:

> "It is a well recognized rule of construction, that whether an informal instrument transferring an interest in real estate, shall be construed as a conveyance or an agreement only, depends, not upon any particular words and phrases it may contain, but on the

intention of the parties, derived from the instrument itself; and when that is doubtful, from the circumstances attending its execution: Kenrick vs. Smick, 7 Watts & Searg., 41; Bortz vs. Bortz, 48 Pa., 382. The intention is so imperative, that even the strongest words of conveyance in the present tense will not pass the legal estate, if other parts of the instrument show that this was not the intention of the parties: Williams vs. Bentley, 27 Penn., 301. . . . In determining this intention, *ex visceribus*, the first rule, however, is to inquire whether the language imports a present conveyance, or whether, collecting all parts, it contemplates a further assurance to pass the title."

And holding the instrument in that case not to be a conveyance, but an agreement to convey, the Court calls attention to the following:

"The instrument is not styled a deed or a conveyance; it is in the nature of an agreement; it is of the most informal character; it does not disclose the slightest efforts to adopt the orderly parts of a conveyance; it is not under seal; indeed it bears upon its face the most distinct and unequivocal marks of an executory contract."

The document in question, translated, reads as follows (Plaintiffs' Ex. 24):

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, Manuel Antonio Otero, resident of the county of Valencia, in the territory of New Mexico, for consideration *have sold and transferred in favor of* Jesus M. Sedillo y Baca and Agapita Ortiz, his wife, as much known as the Rancho of Galisteo, which is situate in the county

of Santa Fe and territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino; *and that I will give and execute the documents of conveyance* of the said ranch, in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there shall be adjudicated and approved by the surveyor general the grant of Bartolome Baca of a tract which was ceded him by the Governor Melgares the year 1819, and which is situate in the County of Valencia and territory of N. M., and furthermore, they will take possession of the aforesaid ranch and will have and enjoy all the products of the same, until the proper documents may be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me.

In witness whereof, we sign the present in la Constancia, county of Valencia, this 22nd day of June, A. D., 1878.

MANUEL A. OTERO
JESUS M. SENA Y BACA.

This instrument, under the authorities already cited, is plainly an executory contract to convey and to make title deeds upon the happening of a certain contingency and to vest the possession and enjoyment of the fruits and products in the proposed vendee, in the interim. The words first underscored, "have sold and transferred," are made inoperative as a present conveyance, by the nature of the whole instrument, by the contingency expressed, under which only shall title deeds become due, by the appearance and terms of the

agreement, by the lack of formalities which would surround a deed, by the absence of seals, or acknowledgment, by the non-recordation by either party, and lastly by the covenant giving the proposed vendee possession and enjoyment of the products, in the interval—which is utterly inconsistent with any idea of a transfer of title to him, for such title would make an expression of its incidents, such as possession and enjoyment, unnecessary.

To the same effect as the above authorities, are cited:

Bell vs. McDuffie, 71 Ga. 264.
Jackson vs. Niven, 10 Johns. (N. Y.) 335.
Neare vs. Jenkins, 2 Yeates (Pa.) 107.
Sherman vs. Dill, 4 Yeates (Pa.) 295, 2 Am. Dec. 408.
Stouffer vs. Coleman, 1 Yeates (Pa.) 393.
Stokeley vs. Trout, 3 Watts. (Pa.) 163.

"And such an intention was held to be shown (to make a contract instead of a deed) where the instrument was informal, called an agreement, expressed to be in consideration of future covenants, having no present consideration, containing no words of inheritance, and not being formally acknowledged."

Stewart vs. Lang, 37 Penn. St., 201, Am. Dec. 78, 414.
Jackson vs. Clark, 3 Johns. (N. Y.) 424.

"Where the construction of an informal instrument was doubtful, the fact that a subsequent conveyance between the same parties

> clearly showed their intention that the first should become therein merged was held to evidence an intention that the first should operate only as an executory agreement."

Skeely v. Pittsburg, 104 Penn. St., 472.

It is well known historically that the Mexican custom of transferring title, involved a delivery to the grantee of the old title deeds pertaining to the property. These were *not* turned over to Sena y Baca, but were retained by Otero, and produced in Court by his heirs. Sena y Baca became, then, the tenant of Otero, under this contract. This tenancy commenced in 1878. And it was agreed in the writing that "from this time forward, they will take possession of the said ranch, and will have and enjoy all the products thereof, until the proper documents shall be executed, in conformity with the above stated, and the said Jesus M. Sena y Baca so agrees."

II.

A POSSESSION SO TAKEN IS NOT ADVERSE. IT IS EXPRESSLY A POSSESSION IN RECOGNITION OF AND ON BEHALF OF THE OWNER.

Sena y Baca was purely a tenant, under the terms of the contract. Such being the case, he was estopped to deny his principal's title.

To start the statute of limitations in his favor therefore, he must oust his principal, set up notorious, adverse, and hostile possession brought home to the notice of his principal, either actually

or presumptively, and repudiate the vendor's title.

"The possession of one entering under an executory contract of purchase becomes adverse where he repudiates the title of his vendor and he may acquire title by adverse possession by occupying the land for the statutory period after such repudiation. The repudiation, however, must be manifested by explicit and unequivocal acts brought home to the vendor's knowledge."

1 *Cyc.* p. 1047, *and citations.*
Hart vs. Bostwick, 14 Fla., 178.
Tyler Ejectment, 875.
1 *Johns*, 156.
9 *Johns*, 163.
3 *Johns. Cases*, 124.
2 *Bibbs R.*, 507.
1 *Marsh*, 62.
Kirk vs. Smith, 9 Wheat., 241.
Jackson vs. Booker, 48 Ill., 203.
Floyd vs. Mintrey, 7 Rich., 181.
Williams vs. Cash, 27 Ga., 507.
Jackson vs. Camp, 1 Cow., 605.
Woods vs. Dille, 11 Ohio, 455.
McManus vs. Matthews, 55 S. W. (Tex. Ct. App.) 589.
Durst vs. Skillern, 45 S. W., (Tex. Ct. App.) 840.
Green vs. Mason, 9 Vt., 37.
S. C. 31 *Am. Dec.* 605.

"The possession of the tenant is consistent

with the title of the landlord, and cannot therefore be adverse to him."

1 *Ency Law* (2 ed.) 810.
Telgham vs. Little, 13 Ill., 241.
Alderson vs. Marshall, 7 Mont., 288.
Jones vs. Pelham, 84 Ala., 208.
Branson vs. Morgan, 84 Ala., 598.
Estes vs. Long, 71 Mo., 605.
Sch. Directors vs. Edington, 40 La. An 633.
Avery vs. Baum, Wright (Ohio) 576.
Thayer vs. Society, 20 Pa. St., 62.
Bidwell vs. Evans, 156 Pa. St. 30.
Davis vs. Hurst, 14 S. W. 610.
Udell vs. Peak, 70 Tex., 547.
Wild vs. Serpell, 10 Grat. (Va.) 405.
Seed vs. Shepley, 6 Vt., 602.
Holley vs. Hawley, 39 Vt., 534.
Swan vs. Thayer, 36 W. Va., 46.

"Where one enters into and holds possession of land under an executory contract of purchase or bond for title the entry and possession are in subordination to the title of the vendor until payment or performance of the conditions by the vendee, or until the vendee has distinctly and unequivocally repudiated the title of his vendor, which repudiation is brought expressly or by legal implication to the vendor's knowledge. There are also a number of decisions in which it is held that a party entering into possession under an agreement to purchase *cannot* dispute the title of him under whom he enters until after a surrender of the possession."

1 Cye. p. 1045; the text being upheld by cita-

tions from nearly every state, see particularly:

Adams vs. Fullam, 47 Vt., 558.

Pratt vs. Canfield, 67 Mo., 50.

Also:

Lucas vs. Brooks, 18 Wall., 436.

Kirk vs. Smith, 9 Wheat., 241.

Heermans vs. Schmaltz, 10 Biss., 323.

Stansbury vs. Taggart, 3 McLean, 457.

1 *Ency. Law* p. 799, *and numerous citations.*

Graydon vs. Hurd, 55 Fed., 724.

"The possession of a tenant holding over after the expiration of the term is considered the possession of the landlord and not adverse to him, for, being once in by lawful title, the law, which presumes no wrong in any man, will suppose him to continue upon a title equally good; nor can the possession become adverse unless the possession is first surrendered, or the tenant has given notice of his adverse claim. The status of a tenant holding over after the expiration of his term has been likened to that of a tenant at sufferance or a tenant from year to year."

1 *Cyc.*, 1061.

Clinton Wire Co. vs. Gardner, 99 Ill., 151.

Mosher vs. Reding, 12 Me., 478.

Gwyn vs. Jones, 2 *Gill & J.* (Md.) 173.

Lyebrook vs. Hall, 73 Miss., 509.

Carson vs. Broady, 56 Nebr., 648.

Den vs. Adams, 12 *N. J. L.*, 99.

People vs. Paulding, 22 Hun. (N. Y.) 91.

Jackson vs. Cairns, 20 Johns. (N. Y.) 301.

Huntington vs. Mattfield, 55 S. W. (Tex.) 361.

Holman vs. Bonner, 63 Miss., 131.

Sena y Baca, however, never did repudiate Otero's title, but clung to the executory contract; his widow and heir quit-claimed only the right she had, which was the right shown by such contract, and delivered the contract with the quit-claim, as did also Rumberg; and the present defendants now present that writing as their muniment of title—endorsing, not repudiating, the Otero title, and claiming under it—as, in fact, they did in the Land Court.

All Sena did was to receive the products, which he was expressly authorized to do by the contract.

> "The usual acts of ownership consistent with the possession of a vendee in possession under a contract of purchase are not evidence of an adverse claim of ownership."
>
> *Hannibal etc., R. Co. v. Miller*, 115 Mo., 158. *S. C.*, 21 S. W., 915.

III

THE POSSESSION OF DEFENDANTS AND ITS EFFECT.

Defendants have proved various possessory acts, by the holders of the ranch, in order to raise a presumption of hostility of possession, and of notice to the true owners. The findings thereon certified to this Court are as follows:

> "5. That the present defendants are the heirs at law of Chavez and that the possession of his heirs, the said defendants, has been

continuous from the time of his entry into the same until the commencement of this suit. That during all this time the possession of Sena y Baca and his privies has been continuous, they have farmed the land, made some improvements in the way of ditches and fences, paid some taxes and received the rents and profits, and have exercised all the possessory rights consistent with claim of ownership, *but all consistent with the right to possess and enjoy the property conferred by the said agreement of 1878.* That the improvements placed upon the said property were incidental solely to the agricultural use of said property and consisted of fences and ditches solely; and that in fact, no improvements were placed upon said property in the way of fencing by defendants or their predecessors until during the occupation by Rumberg in 1888, and thereafter.

"6. That the said premises were solely farming and grazing lands, and at the time of the transaction between Manuel Antonio Otero and Jesus Maria Sena y Baca were under fence, wall and natural barriers serving as a fence.

"7. That there were no acts of hostile or adverse possession by Sena y Baca nor by Agapita Ortiz de Sena, from the date of the said agreement in 1878, except that they returned the same for taxes and paid some taxes due thereon during the several years since the date of the said agreement, farmed the same, leased the same, and sold the produce, and sold and conveyed the same, although by quit-claim deeds, and the said Jesse D. Rumberg, and Jose de La Cruz Chavez, and the present defendants, at all times occupied the property, as herein otherwise stated in these finding of fact."

This discloses no act not entirely embraced within the provision of the agreement of 1878, that Sena y Baca should possess and have and enjoy the products of the land in the interim. Is it remarkable, or worthy of notice by the owner, that his vendee or tenant has received the products, which he expressly has a right to receive? That he has fenced agricultural land, which in order to be useful and to yield its products, must be preserved from damage by animals? That a ditch, a tank, or a new tank, were made to irrigate land which, in order to derive products, had to be irrigated? All these things are merely incidental to the obtaining of produce. There is certainly nothing in all this which is unnatural or improper under the authority to possess, have and enjoy the ranch and its products. There is nothing in this to excite apprehension in the mind of the true owner, nor are these acts such an unequivocal or unmistakable declaration of hostile and adverse claim of ownership, as would be necessary, in order to repudiate the right of the true owner. The court will notice that none of the parties ever lived on the land; that no houses were built thereon; that no fixed improvements of valuable nature, or disconnected with the idea of guarding, growing and receiving produce, have been made. If the defendants had changed the method of using the land, had perhaps platted it into town lots, had built expensive residences thereon, had opened up mines, or done something uncontemplated by the original agreement, or something unusual or remarkable in its nature, that might well have

been an act of notorious possession which would have put the true owner on inquiry. All that defendants can say is that they erected some fence, and built certain ditches which were necessary in order to get crops from the land. It is noticeable that Sena y Baca "made no improvements," nor did his wife. Rumberg, in 1888 and 1889, built up the fences, and fixed the irrigating ditch and tank; but even he did not build a house on this property. Does this look as if Rumberg asserted absolute title in the property? Nor did the Chavezes build any house, or corral, or any permanent improvement on the property, except to erect fences.

These fences, and the tank and ditch, may have had some value, or caused some expense, but certainly these parties were not entitled to the produce of a valuable ranch without doing something in return.

IV.

THE TENANCY RELATION APPLIED TO THE SUCCESSORS OF SENA Y BACA.

> "Not only is the tenant precluded from relying on his possession to bar his landlord, but also all persons who come in under or derive possession from him in any manner, however remotely. In such cases the possession is presumed to be in accordance with the title, and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred. This doctrine has been held to apply in the case of grantees of the tenant in fee, and that, too, though the

> grantee takes the deed in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation."
>
> 1 *Cyc.* 1062, *and citations.*

But in the case at bar, the grantees of the tenant received the writing describing the tenant's right, and placed it of record as their muniment of title (Tr. marg. p. 97.) And the heir of the tenant only quit-claimed her right, title and interest, and did not deny the relation of tenancy. (Tr. marg. p. 97.)

And the deed from Rumberg to Chavez is exactly the same, quit-claiming only the same possessory rights. These deeds clearly show a non-assertion of *title* in the estate, by these parties. (Tr. marg. p. 97.)

The entire case shows that the defendants and their predecessors have undertaken to possess under the agreement of 1878, same having been delivered with each of the forgoing deeds. This is a recognition of and holding for the tenancy, and not a repudiation of it.

> "All persons claiming under a tenant, or deriving their possession from him, however remotely, are precluded from relying upon their possession for the purpose of barring the title of the landlord."
>
> 1 *Encyc. Law*, p. 811, *and numerous citations.*
>
> "Where the relation or landlord and tenant has been once established the possession of the tenant and of his grantee is that of the

landlord, and not hostile or adverse and this is so where such grantee has taken a deed to the fee in ignorance of the fact that his grantor stood in the relation of tenant, the latter denying any such relation. The relation once established, it attaches to all who may succeed to the possession under the tenant."

Bedlow vs. N. Y. Floating Dry Dock Co., 112 N. Y. 265.
Whiting vs. Edmunds, 94 N. Y., 309.

"The vendee (under an executory contract of sale) though not strictly a tenant of the vendor, is estopped from denying his title, and this estoppel applies to whomever acquires possession under him."

Potts vs. Coleman, 67 Ala., 221.
Russel vs. Erwin, 38 Ala., 44.
Jackson vs. Harder, 4 Johns. (N. Y.) 202.

"The widow of a vendee in an executory contract, who continues possession after his death, stands upon the same footing with regard to the vendor as her husband did."

1 *Cyc.* 1049.
Blackwell vs. Ryan, 21 S. C. 112.

"According to the weight of authority, the possession of a purchaser from a vendee on an executory contract is on the same footing as the original vendee. Such possession cannot, as a basis of prescription, be upon any higher or better footing than the possession of the original vendee himself."

1 *Cyc.* 1049.
Hannibal & St. Jo. Co. vs. Miller, 115 Mo., 158.

Fulkerson vs. Brownlee, 69 Mo., 371.
Jackson vs. Bard, 4 Johns, (N. Y.) 230.
Kechum vs. Spurlock, 34 W. Va., 597.
Timmins vs. Kidwell, 138 Ill., 13.
Quinn vs. Quinn, 27 Wis., 168.

V.

THE TERM OF THE TENANCY, UNTIL APPROVAL OF THE BACA GRANT.

What effect upon the tenancy, had the surveyor general's report of 1881?

By the original agreement, Otero bound himself that he "would give and execute the instruments of conveyance of the said ranch, in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there should be adjudicated and approved by the surveyor general the grant of Bartolome Baca, of a tract which was ceded by the Governor Melgares, in the year 1819," etc.

It will be argued by defendants that, if Sena took as a possessory agent or tenant under this agreement, that status only existed until such time as the surveyor general should act; that the surveyor general did render a decision adverse to the Bartolome Baca Grant, in 1881, and that, thereupon, the holding of Sena y Baca ceased to be a holding of right, and necessarily became a trespass, and that the adverse possession was then initiated.

The intent of the parties to this agreement must govern. Did they intend that the action of the "surveyor general," specifically, or the action of the existing legal authority having power to ap-

prove or reject this Baca Grant, should fix the period of Sena's tenancy? The surveyor general was mentioned, it is true; but that was the minor portion of the contingency. *Until the "adjudication and approval,"* was the ruling thing. The surveyor general had authority, under the act of July 22, 1854, to adjudicate and approve, or reject. (10 Stats. at Large, p. 309). Shall we construe the contract strictly—that the adjudication and approval must have been by the *surveyor general*, only, and by no other authority; or shall we hold rather that the parties intended that, when the Baca Grant should be confirmed by competent authority (either that then existing or some other which might be by law substituted), then Sena y Baca should have a right to receive his conveyances to the tract in question? If a strict construction be insisted upon, then we say that the surveyor general has never yet "adjudicated *and* approved" the Baca title. Not yet has that officer done the thing which a strict construction lays as a necessary precedent to the termination of Sena y Baca's tenancy holding.

But what did that officer do? He rendered an opinion—it may also be called a decision—in 1881, against the Baca claim of a grant. This was a report to the Commissioner of the General Land Office. It was not an "approval," such as would be required under strict interpretation, to raise the contingency whereunder Sena y Baca's contract for title might or might not arise. It was simply a recommendation of rejection, on the proofs then submitted. It did not even divest the

surveyor general of jurisdiction, or of power to continue to adjudicate, and, ultimately, to approve, this claim. It was a report made on the then status, only. It was simply an advisory report. The surveyor general had still power, and it was still his duty, to adjudicate and act upon this claim.

Ortiz vs. United States, 176 U. S. 427.

VI.

THE BACA GRANT SUB JUDICE UNTIL 1895.

Until 1895, the property remained sub judice, under the doctrine of this last authority, which demonstrates conclusively that the Baca claim still remained without the "adjudication and approval," and without the definite action required by the contract. This status continued up to 1891. Then the Court of Private Land Claims was created, and the powers of the surveyor general ceased.

What effect had that, on the provisions of the contract? The contract was contingent upon the definite action by competent authority upon this Baca Grant. The gist of the matter was *action by a competent tribunal*. The confirmation, or rejection, was the thing needed to mature the agreement.

If Sena y Baca entered as a tenant or prospective vendee, with right of possession for an indefinite term, and that term then ended by the surveyor general's opinion, his tenancy did not thereby cease, but he simply held over. "The continu-

ance of possession by holding over after the lease is not adverse." 1 Ency. of Law, p. 811. Holding over after term expires simply continues the tenancy as one at will or by sufferance.

VII.

POSSESSION BY TAX PAYMENT.

Defendants have put in certain proof touching the taxation of this property. If the object of that proof be to bring the adverse possession relied on within the terms of the statute of March 16, 1899, (Laws of New Mexico, '99, p. 133), then defendants have certainly failed. That statute amends the previous law as to adverse possession, by giving the bar only in favor of one "who has *paid* the taxes lawfully assessed against the property." In thus requiring "*payment*," the statute means nothing less. Returning for assessment, or even partial payment of the taxes, lawfully assessed, is not sufficient. Defendants have not, of course, paid all or any considerable portion of the taxes charged against the property; and, in the absence of showing to the contrary, those taxes are presumed to be lawful charges.

The findings certified to this Court are that defendants and appellants have paid *some, but not all* the taxes. (Tr. marg. pages, 98-100.)

Numerous authorities to this effect are collected at pages 1106 and 1107, Volume 1 Cyc. of Law and Procedure.

> "A break in the payment for any one or more years of the period is fatal to the claim."

Citing McDonald vs. Drew, 97 Cal., 266 (and various other California authorities); Perry vs. Burton, 126 Ill., 599.

> "To make the bar of the statute complete, it is not sufficient that there be merely color of title. There must also be payment of taxes for seven years."
>
> *Perry vs. Burton, supra.*

In Irving vs. Brownell, 11 Ill., 414, the Court says:

> "The defendant is equally at fault, in his attempt to show payment of taxes upon the land, as required by the law. The statute requires that the person in possession should pay all taxes legally assessed upon the land, during the seven successive years that he has possession. A payment of taxes for seven years, part before and part after possession taken, does not answer the requirement of the law. In this case, it is not pretended that possession was taken before the fall of 1840, and there was no evidence of the payment of taxes by the defendant, after the year 1845. The taxes of 1844 he did not pay, but suffered the land to go to sale, and then purchased it in; which he insists was a payment of the taxes of that year. This is not so. The land was made to pay taxes by the sale, not the defendant. He cannot claim that he paid the taxes, while he, also, at the same time, took the chance of getting a tax title upon the land. It is only lands upon which taxes are not paid that can be sold. In no view of the case did the defendant put himself in a situation to have the benefit of the act of March 2, 1839."

This statute is similar to the New Mexico statute in requiring the payment of all taxes "lawfully assessed." Taxes are presumed to be lawfully assessed because the acts of public officers are presumed to be lawful; and no showing has been made in this case that any of the unpaid taxes are illegal.

In Arkansas the statute is similar also in requiring the payment of taxes in order to constitute adverse possession. In the case of Blakeney vs. Ferguson, 20 Ark. 554, the Court says

> "The bill does not allege that he paid any taxes upon the land at all, and, in the answer of appellants, there is a demurrer to the bill for want of equity. If a material matter, not alleged, could be proven, the evidence fails to prove that Joseph Ferguson paid the taxes upon the land, for the seven years preceding his death.
>
> "It appears that the land was assessed to him for the years 1829, 1830, 1831, 1832 and 1833. The collector's receipts to him for his Territorial and county taxes for the last four years referred to, were produced upon the hearing, but no receipt or other evidence of payment for the year 1829. For the year 1834, it sems that the land was assessed to his son Moses, but there was no proof that the taxes were paid by anyone. It does not appear that the land was assessed to any person for the year 1835. The receipt of the collector to Joseph Ferguson for his taxes for that year was produced, but there is no land or other property described in it."

In this instance the Court will note that there were only two unpaid years out of the seven, and

this was fatal to the claim of adverse possession.

In Texas in the case of Castro vs. Wurzbach, 13 Tex. 131, the Court says:

> "The part of the five years' statute that need be cited is as follows, i. e.: 'That he, she or they who shall have had five years peaceable possession of real estate, cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be held to have full title, precluding all claims, but shall not bar the Government.' (Art. 2392, Hart Dig.) Under this statute the party in possession is not required to deraign his title from the sovereignty; it is sufficient if he holds under a deed duly registered, and shows that the taxes thereon, if any, have been paid by him. . . . . It is required by this five years' statute that the party claiming its benefit should have paid the taxes on the land. That such land was taxed we must judicially know; and if the party claiming by possession had paid, such payment being a condition required by the statute, he should have proven it. There is no evidence that the defendants had paid the taxes, but there is evidence that the taxes for 1849 were paid by the plaintiff or those through whom he derives title. We believe, then, that appellants have failed, in this particular, to bring themselves within the provisions of the statute, and cannot, therefore, avail themselves of its benefit. The evidence before the jury would not have authorized a verdict for the appellants under the five years' limitation any more than under the three years' limitation."

Again in Texas, in Murphy vs. Welder, 58 Tex. 240, the following appears:

"The plaintiffs in error also failed to make out the defense of limitation of five years, the only one of the pleas of limitation in support of which any evidence at all was adduced. . . . . There was also a plain, and in fact a confessed absence of all proof of payment of taxes for at least one of the years necessary to be computed in order to complete the bar of the statute by the lapse of five years from the date of plaintiffs' possession to the date of the institution of this suit. There is no pretence that the taxes for 1878 or 1879, or at least for one of these years, were ever paid. There were no receipts proved for either year, and no receipt produced for a number of years, and, upon the whole, the proof of payment of taxes was so uncertain as fully to justify the Court below in holding, as it did, that the plaintiffs had failed to prove the payment of taxes for the time prescribed, as required by the statute, in order to enable them to avail themselves of the benefit of the plea of five years' limitation."

The case of Martin vs. Ward, 69 Cal., 129, also touches upon the point briefly. This is also a case wherein the defendant was put in possession under an executory contract of sale, and in which the contingency which would vest the defendant's right to a deed, never happened. It is held in this case that it was requisite for the defendant to repudiate the plaintiff's title and change the nature of his possession from an amicable one to a hostile one, and that unless that was done, the statute was not set in motion.

Authorities might be multiplied on the point that under the New Mexico Law of March 16, 1899, payment of taxes is a necessary element of

adverse possession, but it is not anticipated that defendants will undertake to base themselves on this later statute.

Of course we admit the proposition that this amendment of the statute of limitations could not operate to disturb a vested property right in real estate; and, if defendants had had fully ten years adverse possession prior to March 16, 1899—or from March 16, 1889—that would, in the absence of disabilities in the parties sought to be ousted, have ripened into perfect title, not disturbed by the requirements of the law of March 16, 1899. But under this old statute, both minority and coverture were exceptions, and during all these years they protected the rights of the plaintiffs, inherited from Manuel B. Otero. To re-state it: Unless the adverse possession started against the plaintiff, Eloisa L. de Bergere, prior to 1886, (the time of her marriage to A. M. Bergere) and started against the father or grandfather of the minors during their lives, i. e., prior to August 17, 1883, such adverse possession would be unavailing under the old statute of 1858. But if it did so start, prior to 1883 and 1886, as stated, then we admit that the change of the law in 1899 would cut no figure to disturb the title already vested under the old statute. *Defendants have not had the "adverse possession" required by the statute of 1899, which requires payment of taxes;* the sole question, therefore, is whether they had that required by the statute of 1858 (New Mexico Compiled Laws of 1897. Sec. 2937)—*which is inoperative against a feme covert or an infant*—and whether

that adverse possession ripened into title in defendants, not subject to divesture, prior to the repeal and amendment of the law by the statute of March 16, 1899. This, as stated, requires the Court simply to ascertain and determine whether or not, at some time before March 16, 1889, *and* at some time before 1886 in the case of Eloisa L. de Bergere, *and* at some time prior to August 17, 1883, in the case of the minor heirs, this adverse possession (if any ever existed) was initiated.

We contend further, that independent of all other circumstances, the property in question was *sub judice* until 1895 on the confirmation thereof by the Court of Private Land Claims; first, it was *sub judice* while before the Surveyor-General and Congress from prior to 1880 until 1891. Second, when it came into the Court of Private Land Claims where it remained until 1895, during all of which time no suit could have been instituted or prosecuted to quiet the title or determine the right to the title and, as a consequence, during that time, there being no right of action, the Statute of Limitations could not run or commence to run.

Astiazaran v. Santa Rita Land & Mining Co., 148 U. S., 80.

VIII.

THE POSSESSION OF DEFENDANTS AGAIN, IN GENERAL, ITS SCOPE AND NATURE.

The record shows that, prior to 1883, and prior

to 1886, and even prior to March 16, 1899, *nothing* was done which was sufficient to disturb the relation of tenancy, or of possession under the executory contract of sale. A few little things are relied on by defendants, during those years, to show an initiation of adverse holding; but they are none of them inconsistent with the tenancy relation. For instance, the possession, already discussed, which was exactly in accordance, during the eighties at least, with the provisions of the agreement of 1878; and it is notable that Sena y Baca "made no improvements" nor did his wife; nor did they live on the land, nor did they do anything during their holding, which lasted till 1888, except receive the products. Outside of this, the only things relied on to characterize their possession as adverse are: the repute in Galisteo as to the ownership, and the return of the property by Sena y Baca and his wife for taxation, and its non-return by the Otero heirs. In a case where no fiduciary relation existed between the parties, or had Sena y Baca been a mere intruder upon this property, it is quite likely that the notoriety of his claim of ownership in Galisteo would be of considerable weight; but the Court will not forget that Otero lived at a distance; that Galisteo was a small community; that Sena y Baca had a perfect right to the possession of the property under the executory contract; that Sena y Baca never did anything beyond the receiving of the products from the ranch, which was exactly what he was authorized to do under the agreement; that he never built any house on the land, nor made any improvements whatsoever on

it; and it is apparent that no notice of adverse claim was ever brought home to the Otero title. A mistaken idea of ownership, existing among a few neighbors, certainly is not that sort of general notoriety which the Courts hold to be so strong as to raise a presumption that the true owner knew of the adverse claim. It is deemed unnecessary to argue this point further.

While the payment of a portion of the taxes on this ranch is totally insufficient to satisfy the requirements of the present statute of 1899, we admit that proof of such payment was material in this case for the purpose of showing if possible, some claim of title by the predecessors of defendants. But when properly considered there is nothing in this return of the property for assessment, which is inconsistent with the agreement of 1878. Under that agreement Sena y Baca had a tenancy at will in this entire ranch; had full possessory right to the same, until such time as the relation existing between him and Otero should be terminated; and it was eminently proper for him to pay taxes on that possessory right, inasmuch as he was receiving all the profits yielded by the property.

The New Mexico statute on taxation defines the term "real estate" to mean possessory rights in real property, and there is nothing in the record to indicate that Sena y Baca, by paying taxes on his possessory right, was asserting a claim to the fee of the estate. (N. M. Comp. Laws 1897, Sec. 2037.)

IX.

IF THE TENANCY LASTED TILL THE FINAL ADJUDICATION OF THE BACA GRANT IN 1895, THEN APPARENTLY NO RIGHT OF RE-ENTRY EXISTED IN PLAINTIFFS UNTIL AFTER 1895, AND UNDER SUCH VIEW THE STATUTE OF LIMITATIONS DID NOT RUN PRIOR TO THE COMMENCING OF THIS SUIT IN 1901—IRRESPECTIVE OF ALL QUESTIONS OF DISABILITY OF MINORS OR A FEME COVERT OR NON-PAYMENT OF TAXES; NOR DOES ANY QUESTION ARISE AS TO BARRED OR UNBARRED CO-TENANTS.

The substance outlined in this heading has been the view taken by Mr. Justice Mann in the decision of this case below. See opinion, Tr. marg. p. 46, et seq. In this brief, we have gone back of this question into certain interesting matters that have attracted really unnecessary research and study. Sena y Baca being a tenant until adjudication and approval by definitive action by Congress or its agencies, he continued (he and his successors) in such relation of tenancy until Congress, supplanting the surveyor-general with the land court, made that adjudication, in the year 1895. Then the tenancy ended. As said by Judge Mann, even then it is not clear that the tenancy did not continue, at sufferance; but that is immaterial, for whether Sena y Baca's successors became in 1895 or thereafter hostile to the Otero title under which they had theretofore held, such hostility could not have matured into title, ten years not having

lapsed prior to the suit being filed. This is the logical, direct view of the matter, and makes a great portion of the work done in this brief unnecessary. Out of extreme anxiety, however, to go into the case in all its possible phases, we submit these further arguments.

X.

A GENERAL VIEW OF THE STATUS OF THE PARTIES TO THE "AGREEMENT OF 1878" AND THEIR SUCCESSORS.

To recur to the agreement of 1878, which lies at the very base of this controversy: that was an agreement which fixed the status not only of Sena y Baca and the present defendants, but of the other parties to it, Otero, and the present plaintiffs. The general status of the parties plaintiff and their predecessors, since the making of that agreement has been this:

That they have traded the Galisteo ranch for an interest in the unapproved Baca Grant, such trade to become effective on the confirmation of the Baca Grant; that they had put Sena y Baca in possession in the interim, and he had taken the possession amicably and as tenant during the interval until the Baca Grant should be confirmed; that the Baca Grant interest which Sena y Baca had had (which was only a small portion of the interest acquired therein by plaintiffs' predecessor) had been actually conveyed to Otero, and stood in his name; that Otero was thereupon charged equitably with the duty to prosecute, in all fairness, the claim to the Baca Grant, and secure its confirmation,

and to leave Sena y Baca and his successors in right, in possession in the interim. Could Otero, or any one of the plaintiffs' predecessors, have abandoned the Baca Grant claim at any time while it remained *unadjudicated*, and have reclaimed the Galisteo Grant? No; they were bound by the contractual relation, as well as the other side. They could not have reclaimed possession of the Galisteo ranch so long as the Baca Grant remained unadjudicated; they had the title, and they could not allege that it had failed until it did conclusively fail; up to such time, they were subject to the contingency of its possible approval, when they would become bound to execute deeds of conveyance to Sena y Baca and his vendees. It is plain that Otero could not have ejected Sena y Baca from the grant at any time while the Baca Grant remained in his hands, unprosecuted to final conclusion. Had he commenced an action against Sena y Baca to eject him, after the surveyor general's report against the Baca Grant claim, he would have been met instantly with the assertion: We hold possession "until the grant is adjudicated and approved;" it has not been finally adjudicated, and it has not been approved.

In Ortiz vs. U. S. 176 U. S., 427, the introduction of certain testimony was objected to:

> "On the ground that the power of the surveyor general was exhausted by the original investigation and report, and that therefore a succeeding incumbent of the office was without legal authority to have further considered the grant or to have taken any additional tes-

timony as to its genuineness or validity.

"But the function of the surveyor general, under the act of 1854, 10 Stat. 308, was merely advisory, and, until action by Congress had supervened, it was not only the right, but the duty of that official on proper suggestion being made to him, to hear additional evidence and transmit it for the consideration of Congress, in a claim pending for confirmation. The act of the surveyor general in making the supplementary investigation was certainly either directly or impliedly authorized or ratified by his official superiors, since the knowledge of the investigation was conveyed to the Commissioner of the General Land Office, and not only the action taken by the surveyor general, but all papers relating thereto, were by the Secretary of the Interior laid before Congress..... The Court below properly admitted the supplementary proceedings."

This case demonstrates absolutely that a claim once filed remains *sub judice* before the surveyor-general, and Congress, subject to "adjudication and approval" at any time. And this status continues until the creation of the Court of Private Land Claims. In that Court, Otero's successors proceeded to attempt to realize the consideration offered them by the contract of 1878 by Baca, and proceeded to perform the equitable duty that rested on them, to secure the "adjudication and approval" of the title which had been placed in their hands for that purpose. They have performed their part of the contract, and have met, in the Supreme Court of the United States, a definite and final destruction of the Baca Grant claim; then, and then only, did their right accrue under

the contract of 1878, to reclaim the possession of the Galisteo lands.

On the other hand, when could Sena y Baca have compelled the making of deeds of conveyance, under the contract? Certainly not as long as the Baca claim remained unadjudicated and unapproved or finally disapproved. Had such performance been asked by Sena y Baca, it is immediately apparent that Otero and his successors would and could and should have said, No, we have not got that which you have traded us yet; we are trying to get it, but the Baca Grant is not yet adjudicated and approved, and you have no right to your deeds until that time. And such a contention would plainly have been upheld in any action.

We insist that the Galisteo Ranch never became demandable by plaintiffs until the final action of the Supreme Court of the United States in 1895, on the Baca Grant claim; that this was the sense and scope of the original agreement, and that plaintiffs could not have instituted ejectment prior to that time.

XI.

NO ERROR WAS COMMITTED BY THE EXCLUSION OF CERTAIN OFFERED EVIDENCE. (Tr. marg. p. 112 to 122.)

As to the proof offered by defendants as to certain small holding claims, the object of that proof is to show that plaintiffs have substantially acquired the Baca Grant. But the proof is utterly incompetent to show such fact; and absolutely

shows the contrary thereof. The Baca Grant was traded as a title to an immense area of land, containing more than eleven leagues, for which amount the Court of Private Land Claims confirmed it. Any possessory right claimed by small holding proceedings to isolated tracts, within this grant, have no connection with the grant itself, which was the thing transferred by Sena y Baca. On its approval, as a *grant* and, to the extent it had as a valid *grant*, the agreement was predicated. It is deemed unnecessary to say more on this point.

Furthermore, the court examined the escrow in question and determined that there was nothing in it material to the inquiry. (Tr. marg. p. 115.)

XII.

THE CLAIM OF DEFENDANTS AND APPELLANTS (ASSIGNMENT OF ERROR 5, TR. MARG. p. 138) THAT PLAINTIFFS FAILED TO PROVE THAT THE LANDS SUED FOR WERE NOT EMBRACED IN CERTAIN EXCEPTIONS IN THE DEED FROM MIGUEL E. PINO TO THE PREDECESSOR OF A. OTERO.

The title to this Rancho was in Miguel E. Pino up to 1856, when he executed a deed (Tr. marg. p. 100), to Jose Chaves y Costillo, the grandfather of Manuel Antonio Otero. Defendants and appellants deraigned their alleged title to the grant, through and beyond Pino, to Chavez y Costillo, and from him by (omitting the links) Agapita Ortiz de Sena (widow of Sena y Baca) to them-

selves. This with their entry into possession under Otero in 1878, estops them from going back of 1856 now, to find some untransferred fractions of the Pino title, and try to defeat plaintiffs' right of action, because of such pretended outstanding title. Defendants do not show that they hold by such outstanding title, in any event. The presumption is that if any title remained in Pino, unconveyed to Chaves y Castillo, it was extinguished in favor of Manuel Antonio Otero, both by his personal possession from 1865 to 1878, thirteen years, and by his possession by his tenant, Jesus Ma. Sena y Baca and his widow from 1878 to 1888. Defendants entered under the Otero title; they never surrendered or terminated that possession, nor instituted a new possession under any attempted reviver of some old flaw in the Pino conveyance. To this situation, the case of Fletcher vs. Fuller, 120 U. S., 525, applies exactly.

It may be that there were other rights in this Rancho de Galisteo, back in the fifties, which were not acquired by deed. But in 1856, Jose Chaves y Castillo received the ranch from Miguel E. Pino, held it until 1865, when it went by inheritance to Manuel Antonio Otero, who held it from 1865 to 1878, when he put it into the possession of Sena y Baca, who held it under the agreement of 1878 until 1884, when, dying, he left his widow in charge, under the same agreement, until 1888.

This destroys the confusing theory spun by defendants, that they may have acquired some foothold in the Rancho de Galisteo, superior to the

plaintiff's title under which they had entered. Pino deeded all the Rancho, with certain exceptions—and the defendants and appellants have not acquired any one of the excepted parcels. These excepted parcels are certainly not now held by the defendants, and apparently have not been heard from since 1856. As stated above, Otero held the entire ranch from 1865 to 1878; this is the testimony, undisputed. Sena y Baca took in amity with the Otero title, and held by tenancy at will. In like manner, Rumberg, succeeded to the possession; and the present defendants succeeded Rumberg. They cannot be permitted to resist the title under which they themselves hold, because of certain forgotten and abandoned exceptions in the old Pino deed, which they, the defendants, have not acquired.

It is hoped that no confusion will be felt by the Court on this feature of the case. It strikes us that defendants are attempting to becloud the issues by this line of argument, as well as by their references to the "allotments at Cadiall and Tacubaya.....and premises within the San Cristoval or Eaton Grant"—none of which premises have anything to do with the Rancho Galisteo. The Rancho de Galisteo was only a small corner of the "Galisteo Grant," which latter was claimed to embrace 24,000 acres, and to cover the settlements or allotments at Cadiall and Tacubaya, and to encroach upon and conflict with the Eaton or San Cristoval Grant. But this "Galisteo Grant," as so construed, was not confirmed. The Grant was limited, in its confirmation, to the Rancho de Gal

isteo. The Rancho de Galisteo, and the 300 odd acres of land in it, is the only land in question in this case, and is the parcel which was held by Pino, known as the "Pino Ranch," or "Galisteo Ranch"—before that known as the "Loya Ranch," and afterwards held by Manuel Antonio Otero, from whom defendants acquired their possession of it.

XIII.

NO NOTICE TO QUIT WAS NECESSARY IN THIS CASE.

Sena y Baca was, under the agreement, a tenant for a determinable period. As a matter of law, we do not think his tenancy ceased until the definitive adjudication of the Baca Grant, in 1895, in the Supreme Court of the United States. But if it concluded upon the adverse report of the Surveyor General in 1881, having entered in harmony with the Otero title as a tenant or vendee under an executory contract of sale, his possession became converted into a tenancy at will or by sufferance, and so continued until he repudiated, or his successors repudiated, the Otero title and instituted adverse possession. As discussed in the main portion of this brief, they may have started this adverse possession when Rumberg went in and made some improvements, in 1889, but certainly not before that date. It may have been even later, in 1893, when they filed the action for confirmation of the grant in the land court. But these possessions are unavailing, because against minors, and because they are not accompanied by tax-payment.

So, clearly, Sena y Baca and his successors were tenants at will or by sufferance, at least, until such repudiation.

When that repudiation happened, it terminated the tenancy, so far as defendants and their predecessors are concerned, from that time. Defendants have pleaded the statute of adverse possession, and they are estopped to deny that they are in hostile possession, and were in hostile possession when the suit was brought. So, having taken that attitude, and being in that attitude, they were not entitled to notice to quit in order to break a tenancy relation which they had theretofore broken themselves. Not long enough before to ripen their adverse title, it is true, but long enough before to destroy so far as they are concerned, the relation of tenancy.

See 15 *Cyc. page* 56; *Williams vs. Cash.*, 73 Am. Dec. 739.

All of which is respectfully submitted.

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CHAVEZ *v.* BERGERE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 5. Submitted October 30, 1913.—Decided December 8, 1913.

Although containing some words adapted to a present transfer, if the instrument taken in its entirety shows that it was a mere contract to convey upon a specified contingency it will be construed as such and not as a conveyance. *Williams* v. *Paine*, 169 U. S. 55.

Where an alleged Mexican grant was rejected, one who was in possession under a contract to purchase the same if confirmed, and who thereafter acquired portions thereof under the public land laws, was not obliged to surrender such portions in order to recover what he had paid his vendor on account of the contract to purchase the entire tract.

Possession by the vendee under an uncompleted contract to purchase is not adverse to the vendor, nor does it become so until after unequivocal repudiation of the relation created by the contract.

Manifest intention of the parties must be given full effect; and so *held* that approval by the Surveyor General of a Mexican grant referred to the approval of the grant by the proper authority.

Where a contract to purchase under which the vendee is in possession is terminated by an event which renders it impossible for the vendee to complete, his continued possession thereafter is without right and if he sets up an adverse right in himself demand for surrender is not a prerequisite to maintenance of ejectment.

In ejectment, defendants who acquired possession as conditional vendees of the plaintiff are estopped from calling in question the title of the latter.

14 N. Mex. 352, affirmed.

THE facts, which involve the construction of a contract for sale of an unconfirmed Mexican grant, and the relative rights of the parties thereto, are stated in the opinion.

Mr. A. B. Renehan for appellants.

Mr. T. B. Catron and *Mr. R. C. Gortner* for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action in ejectment to recover the possession of 317 acres of land in Santa Fe County, New Mexico. The defenses interposed were the general issue and that the cause of action did not accrue within ten years before the action was begun. A trial to the court without a jury resulted in a judgment for the plaintiffs, which was affirmed by the Supreme Court of the Territory, 14 N. Mex. 352, and the case was then brought here. A statement of the facts, in the nature of a special verdict, and of the rulings and exceptions upon the rejection of certain evidence was made and certified by the appellate court agreeably to the act of April 7, 1874, 18 Stat. 27, c. 80, § 2.

Briefly stated, the principal facts are as follows: On June 22, 1878, Manuel A. Otero and Jesus M. Sena y Baca entered into an agreement written in Spanish a translation of which is as follows:

"Know all men by these presents: That I, the undersigned, Manuel Antonio Otero, resident of the county of Valencia, in the territory of New Mexico, for consideration, have sold and transferred in favor of Jesus M. Sena y Baca and Agapita Ortiz, his wife, a ranch known as the Ranch of Galisteo, which is situated in the county of Santa Fe and Territory aforesaid, known as the ranch which was formerly of the deceased Don Miguel E. Pino; and that I will give and execute the documents of conveyance of said ranch in favor of Jesus M. Sena y Baca and Agapita Ortiz, as soon as there shall be adjudicated and approved by the Surveyor General the Grant of Bartolome Baca of a tract which was ceded him by the Governor Melgarez in the year 1819, and the which is situate in the county of Valencia in the Territory of New Mexico, aforesaid, and furthermore they will take possession of the aforesaid ranch and will have and enjoy all the products

of the same until meanwhile the proper documents may be executed, and in conformity with the above stated; and the said Jesus M. Sena y Baca so agrees and has signed here jointly with me.

"In Witness Whereof, we sign the present in La Constancia, County of Valencia, this 22nd day of June, A. D. 1878.

"MANUEL A. OTERO.
"JESUS M. SENA Y BACA."

At that time the Galisteo ranch and the Bartolome Baca tract were supposed or claimed to be unconfirmed Mexican grants, the former of 24,000 acres and the latter of a vastly greater area. Otero had some substantial right in the former, and Sena y Baca was asserting an undivided interest in the latter, as an heir of the original grantee. As part of the transaction between them, Otero was to receive, and a few days after the signing of the agreement did receive, from Sena y Baca a deed for the latter's asserted interest in the Bartolome Baca tract.

The alleged grant from Mexico of that tract was thereafter presented to the Surveyor General for New Mexico for examination and report under § 8 of the act of July 22, 1854, 10 Stat. 308, c. 103. That officer, on September 7, 1881, made a report recommending, upon the proofs then before him, that the grant be not confirmed but rejected, and this report was duly laid before Congress for such action thereon as it should deem just and proper. While the matter was awaiting action by Congress, the Court of Private Land Claims was created by the act of March 3, 1891, 26 Stat. 854, c. 539, and was invested with jurisdiction of proceedings looking to the confirmation or rejection of such grants. The Bartolome Baca grant was then appropriately brought before that court for consideration and adjudication, and was confirmed to the extent of 11 square leagues; but in 1897, on an appeal to this court

the judgment of confirmation was reversed and the grant rejected as invalid because resting upon a forged signature of the Governor. *United States* v. *Bergere*, 168 U. S. 66.

In the meantime the Galisteo grant was presented to the Court of Private Land Claims for consideration and adjudication, and was by that court confirmed as a valid grant for 317 acres, only, the confirmed area being the land here in controversy.

The plaintiffs are heirs at law of Otero, who died in 1882, and the defendants are the successors in interest of Sena y Baca and his wife under the agreement of 1878. The mesne conveyances through which the defendants became such successors were quit-claim deeds, and were accompanied by a delivery of the original agreement.

Sena y Baca and his wife went into possession of the land in controversy under and pursuant to that agreement, and they and their successors continued in possession, farmed the land, made such improvements thereon as were incidental merely to its use in that way, received the rents and profits, paid some but not all of the taxes, and exercised other possessory rights ordinarily incident to ownership, but all consistent with the rights conferred by the agreement of 1878.

In the proceeding in the Court of Private Land Claims relating to the Galisteo grant, the successors of Sena y Baca and his wife sought to secure a confirmation of the grant for the full 24,000 acres theretofore claimed, and in that connection traced their right through the agreement with Otero, thus recognizing his title.

The present action was begun April 3, 1901, without any prior demand for the possession. At that time the defendants were openly claiming full title in themselves, notwithstanding the prior adjudication of the invalidity of the Bartolome Baca grant and notwithstanding there had been no conveyance by Otero or his heirs of the Galisteo grant as contemplated by the agreement.

Other facts disclosed in the certified statement will be noticed in connection with particular questions upon the decision of which it is claimed they have a bearing.

The territorial courts held that the agreement of 1878 was not a conveyance, but an executory contract for a conveyance in the event, and only in the event, of the favorable adjudication and approval of the Bartolome Baca grant; that this event became an impossible one when, in 1897, this court rejected that grant as invalid; that the defendants' rights under the agreement were thereby terminated and extinguished; that the possession of Sena y Baca and his wife, which was continued by their successors, was acquired and held under the agreement and in recognition of Otero's title, and therefore was not adverse; and that upon all the facts the plaintiffs were entitled to recover.

While it does not appear to be claimed that the question of title as between these litigants was adjudicated by the Court of Private Land Claims in the Galisteo case, it is well to observe that the act creating that court and defining its jurisdiction declared in subdivision 5 of § 13: "No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands." See *United States* v. *Conway*, 175 U. S. 60, 71.

1. It is urged here that the agreement of 1878 in itself transferred the title to the Galisteo grant from Otero to Sena y Baca and his wife, and that the conveyance which was to be executed upon the adjudication and approval of the other grant was to operate only by way of a further assurance. Like the territorial courts, we think other-

wise. Although containing some words adapted to a present transfer, the instrument, taken in its entirety, shows that it was a mere contract to convey upon the contingency specified, with a provision investing the prospective vendees with the right of possession in the meantime. Had a present conveyance been intended, the right to a further assurance hardly would have been conditioned upon a contingency in no wise bearing upon the adequacy of the original conveyance, and, equally, the provision respecting the possession in the interim would have been superfluous. Then, too, the informality of the instrument, the signing by both parties, and the absence of an acknowledgment make against the claim of a conveyance *in præsenti*. Bearing in mind that the question is one of intent, and judging of this by what appears upon the face of the instrument, we think it clearly was designed to be a contract to convey and not a conveyance. See *Williams* v. *Paine*, 169 U. S. 55, 76.

2. In 1898 and 1899, after the Bartolome Baca grant was adjudged invalid, the plaintiffs severally made application, under §§ 17 and 18 of the act of 1891, as amended February 21, 1893, 27 Stat. 470, c. 149, and June 27, 1898, 30 Stat. 495, c. 504, for small-holding claims of 160 acres each within the limits of the rejected grant; and upon the trial the defendants sought to make proof of the advantageous sale or disposal of those claims. The evidence was rejected, and this it is contended was prejudicial error because, first, what was done tended to show that the plaintiffs treated the agreement of 1878 as executed rather than executory, and, second, even if the agreement was executory, the plaintiffs could not recover in the action without first surrendering to the defendants the advantages obtained through those claims. The contention is untenable. The right to those claims did not arise out of the agreement of 1878 or out of the rejected Bartolome Baca grant, but arose, if at all, because the

plaintiffs were in possession and the United States permitted the acquisition of title to public land in New Mexico in that way. The alleged Bartolome Baca grant being out of the way, whether the plaintiffs secured title to the 160-acre tracts and what they did with them were matters which did not concern the defendants.

3. Another contention is that the facts certified demonstrate that the defendants and their predecessors had been in adverse possession for more than ten years when the action was begun, and therefore that the defense of the statute of limitations was well founded. In our opinion, the territorial courts rightly held otherwise. Sena y Baca and his wife went into possession in virtue of a right so to do which was expressly given by the agreement and was to continue until the happening of the event whereby their right to a conveyance was to be determined. Thus, their possession was not hostile or adverse, but in subordination to the Otero title, and the possession of their successors was plainly of the same character up to the time of the determinative event. There had been no unequivocal repudiation of the relation created by the agreement, for all that was done was consistent with a holding under it. Not until the conditional right to a conveyance was terminated did the possession cease to be a permissive one under the agreement, and that conditional right was not terminated until this court adjudged the Bartolome Baca grant invalid and rejected it. That was less than four years before the action was begun.

We do not overlook the reference in the agreement to the Surveyor General as the one whose decision was to be determinative, or his adverse report which preceded the action by more than ten years. While the agreement uses the words "shall be adjudicated and approved by the Surveyor General," the naming of that officer evidently resulted from a misconception of his power and duty. Under the act of 1854, in force at the time, he was

not entrusted with power to adjudicate and approve Mexican grants, but was required to examine into their status and report thereon as a convenient means of aiding Congress in determining what should be done. His action was merely advisory, the power to decide and to approve or reject being reserved to Congress. *United States* v. *Ortiz*, 176 U. S. 422, 427. But notwithstanding the mistake, the intention of the parties is manifest and full effect should be given to it. To them the important thing was the adjudication and approval of the Bartolome Baca grant, and the particular governmental agency from which such action should come was of secondary consideration. They could make their future acts and rights dependent upon the former, as was done, but were without power to designate the latter. Evidently they named the Surveyor General in the belief that the power to adjudicate and approve had been lodged in him, their meaning being the same as if they had said "shall be adjudicated and approved by the proper authority." This, in our opinion, is the true construction of the agreement. Of course, an authorized adjudication and approval was contemplated, not one that would be without authority and of no effect.

Being in the nature of a recommendation only, the adverse report of the Surveyor General was not final and bound no one. It did not even preclude him from making a further examination and basing a favorable report thereon. *United States* v. *Ortiz, supra.* Had Congress disapproved his adverse report and confirmed the grant, we entertain no doubt that the confirmation would have satisfied the condition of the agreement and have entitled Sena y Baca and his wife to the stipulated conveyance; and a like result would have ensued had the decision of this court been one of confirmation instead of rejection.

It follows that the relation created by the agreement was not terminated by the Surveyor General's report in 1881, but continued until the adverse decision of this

court in 1897, and that the possession in the interim, like that before, was in virtue of the agreement and not adverse.

4. After the agreement was terminated by the adverse decision upon the Bartolome Baca grant the continued possession of the defendants was without right, and when the action was begun, almost four years thereafter, they were asserting full title in themselves. Therefore, a demand that they surrender the possession was not a prerequisite to the maintenance of the action.

5. We are asked to say that the findings do not show title in the plaintiffs' ancestor, Manuel A. Otero, or, at least, are so conflicting upon that point as to afford no basis for the judgment. The findings to which attention is invited may be summarized as follows: (a) At the date of the agreement the title to the land in controversy was in Otero; (b) as confirmed, the Galisteo grant consists of the land in controversy, but prior to confirmation it was claimed to embrace a much larger area; (c) Otero's title to the grant was founded upon a conveyance in 1856 which excepted three designated parcels theretofore transferred to others; and (d) the plaintiffs' proofs did not disclose whether the land in controversy passed under that conveyance or was within the excepted parcels.

While recognizing that these findings are confusing, if not conflicting, we think the judgment is adequately sustained by other findings which show that the agreement of 1878 did not contain the exceptions shown in the conveyance of 1856; that Sena y Baca and his wife went into possession of the land in controversy under that agreement; and that the possession which passed from them to their successors, including the defendants, was likewise a possession in virtue of the agreement. In short, the defendants acquired possession as conditional vendees of Otero, and so are estopped from calling his title in question. As is said in Tyler on Ejectment (p. 543):

"There is a class of cases in which the defendant is not permitted to controvert the title of the claimants in an action of ejectment on the ground of *estoppel*. These are cases where a privity exists between the defendant and the plaintiff, or those from whom he derives title. If a privity in estate has subsisted between the parties, proof of title is ordinarily unnecessary on the part of the plaintiff, for the reason that a party is not permitted to dispute the title of him by whom he has been let into possession. In all these cases, therefore, the proof is directed to the question as to whether such a relation exists between the parties as to operate as an estoppel, and thereby supersede the necessity of introducing any evidence to establish the title of the claimant."

And again (p. 559): "Although strictly speaking, the relation of landlord and tenant is not created between vendor and vendee; yet the vendee, in ejectment by the owner against him, is absolutely estopped, from either showing title in himself, or setting up an outstanding title in another; and the same rule applies to one coming into possession under the vendee, either with his consent, or as an intruder."

Of like import are *Lucas* v. *Brooks*, 18 Wall. 436, 451; *Jackson* v. *Walker*, 7 Cow. 637, 642; *Towne* v. *Butterfield*, 97 Massachusetts, 105; *Lacy* v. *Johnson*, 58 Wisconsin, 414, 423.

As we find no error in the record, the judgment is

Affirmed.